SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 428

H. CHASSANIOL ET AL., APPELLANTS,

vs.

CITY OF GREENWOOD

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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IN SUPREME COURT OF MISSISSIPPI

No. 30494

H. CHASSANIOL, Appellant,

vs.

CITY OF GREENWOOD, Appellee

PETITION FOR APPEAL—Filed Aug. 10, 1933

To the Honorable Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi:

The above named H. Chassaniol and R. F. Sabin, B. B. Provine and W. F. Levy, sureties on the appeal bond to the Supreme Court of the State of Mississippi, all resident citizens of Leflore County, Mississippi, feeling aggrieved by the judgment rendered in the foregoing and above entitled cause on the 5th day of June, 1933, do hereby pray an appeal from said judgment to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citations may issue as provided by law, and that a transcript of the record, and all other proceedings and documents upon which said judgment was rendered, duly authenticated, be sent to the Supreme Court of the United States under the law and rules of such cases made and provided; and your petitioners further pray that the proper order relating to the proper security therefor be made.

As in duty bound your petitioners will ever pray.

Edward W. Smith, Ward Allen, Marcellus Green, Samuel Green, Attorneys for Petitioners.

[File endorsement omitted.]

[fol. 2] IN SUPREME COURT OF MISSISSIPPI

No. 30494

H. CHASSANIOL

vs.

CITY OF GREENWOOD, Appellee

ORDER ALLOWING APPEAL—Filed Aug. 10, 1933

On petition of H. Chassaniol, appellant in the above styled cause, and R. F. Sabin and B. B. Provine and W. F. Levy, sureties on his appeal bond in said cause, it is ordered that an appeal to the Supreme Court of the United States, sitting in the City of Washington, D. C., from the judgment heretofore filed and entered herein in the Supreme Court of Mississippi, on the 5th day of June, 1933, be, and the same is hereby allowed, and it is further ordered that a certified copy of the transcript of the record and all other proceedings herein be forthwith transmitted to said Supreme Court of the United States; and it is further ordered that the bond on appeal be fixed at the sum of five hundred dollars ($500.00), conditioned as required by law.

Sydney Smith, Chief Justice of the Supreme Court of Mississippi.

Aug. 9th, 1933.

[File endorsement omitted.]

[fols. 3 & 4] Bond on appeal for $500.00, approved and filed Aug. 10, 1933, omitted in printing.

[fol. 5] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 10, 1933

To the Honorable Tom Q. Ellis, Supreme Court Clerk:

The appellants, H. Chassaniol, and B. B. Provine, R. F. Sabin, and W. F. Levy, sureties on the appeal bond in the state court, having perfected their appeal of the above styled cause from the Supreme Court of the State of Mississippi to the Supreme Court of the United States, you

will please, in making the record for this appeal, include in said record the following:

1. Appellant's bill of exceptions to the action of the City Council of the City of Greenwood upon his application for a refund of taxes.

2. Final judgment of the Circuit Court of Leflore County, Mississippi.

3. Appeal bond to the Supreme Court of Mississippi.

4. Assignment of errors in Supreme Court of Mississippi.

5. The judgment and opinions of the Supreme Court of Mississippi, including the dissenting opinion of Justice Anderson.

6. Judgment of Supreme Court of Mississippi on suggestion of error.

7. The appellate proceedings herein to the Supreme Court of the United States, including petition for appeal, assignment of errors, statement of jurisdiction, order granting the appeal, appeal bond with the approval thereof, notice to appellee required by Sec. 2 of U. S. Sup. Ct. Rule 12 and waiver of citation by appellee, and this præcipe.

[File endorsement omitted.]

[fols. 6-24] This the 8 day of August, 1933.

Edward W. Smith, Ward Allen, Marcellus Green, Samuel Green, Attorneys for Appellant.

I herewith acknowledge the service upon me of a copy of the above and foregoing præcipe. This the 9 day of August, 1933.

J. A. Lauderdale, Assistant Attorney General of Mississippi, by A. H. Bell; A. H. Bell, W. S. Wardman, Attorneys for Appellee, by A. H. Bell.

[fol. 25] [File endorsement omitted]

IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Aug. 10, 1933

Now comes H. Chassaniol, and B. B. Provine, R. F. Sabin and W. F. Levy, sureties on his appeal bond, and assign errors in the above entitled cause as follows:

1. The state court erred in holding that the defendant appellee was not liable to appellant for all amounts of taxes sought to be refunded, and in entering judgment for appellee in this, that:

(a) The undisputed facts as reflected by the record show that the appellant was engaged solely and exclusively in interstate commerce, and the tax sought to be recovered by appellant by the terms of its imposition taxed the privilege of engaging in such commerce.

2. The state court erred in placing upon the statutes and ordinances involved in this case a construction which would render such statutes and ordinances constitutional, as not contravening the commerce clause of the federal constitution, in that as applied to the business of appellant no such construction is possible.

3. The state court erred in holding that the record con- [fol. 26] tained agreements of the parties constituting merely conclusions from facts and the understanding of the parties as to the general course of business dealing by which it was not bound, in that the record contains no such agreements, conclusions and understandings, but on the contrary contains only proof of specific facts from which there arises one logical conclusion, to-wit: that appellant was engaged solely in interstate commerce.

4. The state court erred in holding that there was any intrastate commerce in the business of appellant, and in holding that the statutes and ordinances involved in this cause were valid and constitutional because limited to transactions in intrastate commerce. The state court was not called upon to determine whether or not, under circumstances different from those disclosed by the record, the taxing statute might be constitutional as against a person engaged in intrastate commerce, but was only called upon to determine whether appellant was engaged in intrastate or in interstate commerce.

5. The state court erred in holding that the construction of the statutes and ordinances involved in this cause is for the state court alone, and that Federal Courts are bound thereby, in that the scope and extent of the statutes and ordinances are for the state court but such scope and extent being ascertained by the state court, the application

of such statutes and ordinances and the determination of the question as to the nature of the commerce engaged in by appellant is then for the Federal Courts.

6. And for other causes to be assigned.

Wherefore, appellants pray that the said judgment may [fols. 27 & 28] be reversed and for such other and further relief as to the court may seem just or proper.

This the 8th day of August 1933.

Edward W. Smith, Ward Allen, Marcellus Green, Samuel Green, Attorneys for Appellant.

[fols. 29-33] Service of the above and foregoing statement, together with the copies therein mentioned, is hereby acknowledged, and the appellee by its attorneys does hereby waive the issuance and service of a citation herein, and does hereby enter its voluntary appearance in said cause in the Supreme Court of the United States. This the 8th day of August, 1933.

J. A. Lauderdale, Asst. Attorney General of State of Mississippi, by A. H. Bell; A. H. Bell, W. S. Wardman, Jr., Attorneys for Appellee, by A. H. Bell.

[fol. 34] BEFORE CITY COUNCIL OF CITY OF GREENWOOD

Bill of Exceptions

Be it remembered, that at 7:30 P. M., on Tuesday, December 6, 1932, there was duly assembled and held a regular meeting of the City Council of the City of Greenwood, Leflore County, Mississippi, in the City Hall of said Municipality, the same being the proper time and place for said meeting; all of the members of said Council were present and voting, and present also were Bonner Duggan, Clerk of said Municipality, and A. H. Bell, Attorney for said Municipality.

At and during said meeting there was submitted and presented by H. Chassaniol his verified application for refund of money paid by the said H. Chassaniol as privilege license for conducting his business within said municipality, and which privilege license was and is alleged by the said

H. Chassaniol to have been erroneously paid. The said verified application is in the following words and figures, to-wit:

APPLICATION FOR REFUND OF ERRONEOUSLY PAID PRIVILEGE TAXES

To the City Council of the City of Greenwood, Mississippi:

The undersigned H. Chassaniol, applicant, trading as Chassaniol & Company, respectfully says that from and since September 1, 1931, he has engaged in the City of Greenwood, Leflore County, Mississippi, in the business of cotton buyer and seller; that on June 3rd, 1930, the said municipality adopted and enacted an ordinance levying upon the aforesaid business of applicant an annual privilege license of Fifty Dollars ($50.00), said ordinance being the same as is found of record in ordinance Book 3, at pages 241-243, of the record of ordinances of said municipality, a certified copy of said ordinance being hereto attached as "Exhibit A", and made a part hereof. On the first day of October, 1931, said municipality, acting through its officers and agents, and under the color and purported [fol. 35] authority of said ordinance, required and compelled applicant to pay for the privilege of conducting his said business for a period of one year from September 1st, 1931, a privilege license of Fifty Dollars ($50.00). Payment of said privilege license is evidenced by Privilege Tax License Receipt of said municipality No. 3007, a copy of which is hereto attached as "Exhibit B" and made a part hereof. Said payment was under protest, duly made by applicant, as is shown by pen and ink notation appearing in the face of said receipt. The original of said receipt will be produced by applicant at any time the same may be requested by the official board, or any other official, of said municipality.

On June 7th, 1932, the said municipality adopted and enacted an ordinance levying upon the aforesaid business of applicant an annual privilege license of Fifty Dollars ($50.00), said ordinance being the same as is found of record in Ordinance Book 5, at Pages 26-27, of the records of ordinances of said municipality, a certified copy of said ordinance being hereto attached as "Exhibit C", and made a part hereof. On the first day of September, 1932, said municipality, acting through its officers and agents,

and under the color and purported authority of the last ordinances aforesaid, required and compelled applicant to pay, for the privilege of conducting his said business for a period of one year from September 1st, 1932, a privilege license of Fifty Dollars ($50.00), payment of said privilege license is evidenced by Privilege Tax License Receipt of said municipality No. 3034, a copy of which is hereto attached as "Exhibit D", and made a part hereof. Said payment was under protest, duly made by applicant, as is shown by pen and ink notation appearing in the face of said receipt. The original of said receipt will be produced by applicant at any time the same may be requested by the official board, or any other proper official of said municipality.

Applicant respectfully requests the refunding of the [fol. 36] aforesaid sums, amounting to a total of $100.00, under the provisions of Section 2591 of the Mississippi Code of 1930, on the grounds that the aforesaid ordinances, and both of them, are, when applied to applicant's said business, a burden upon interstate commerce, and contravene Article I, Section 8, Clause 3, of the Constitution of the United States, commonly called the commerce clause thereof. Applicant says that his said business is interstate commerce because of the following facts, to-wit:

The Mississippi Delta, an alluvial body of land located within the confines of the State of Mississippi, comprises about 6,650 square miles; it is bounded on the north by the northern boundary of the State, and extends along the western boundary of said State in a southerly direction, for approximately 190 miles, the western boundary thereof being the Mississippi River. It varies in width from from a few yards to approximately 50 miles. The said Mississippi Delta was formed by the action of the Mississippi River in overflowing the same, and gradually building it up to a height in which it became susceptible of cultivation. The character of the soil in said Mississippi Delta makes it peculiarly adaptable to the growing of what is commonly known as Delta-type, long staple cotton, which is a cotton, and a peculiar type of cotton, recognized throughout the world in the cotton trade as being of a superior type, character, and strength. Yarns spun from the famous Egyptian and Sea Island long staple cottons.

The City of Greenwood is centrally located in said Mississippi Delta, which is exclusively an agricultural community, and its principal crop is that of said long staple cotton. It produces an average crop of approximately 700,000 bales, which is more than forty per centum of the average annual production of cotton in the State of Mississippi, and said cotton is the only product which is raised by the agriculturalists located in said Delta, and which is sold upon the open market, and is the source from which is produced the case revenue out of which practically the entire populace of the said Delta derives its livelihood.

[fol. 37] All of said cotton, when it repens in the field, is picked by hand, but through a ginnery, by the process of which the lint is removed from the seed, and the lent cotton, (in which plaintiff deals exclusively as hereinafter alleged) is wrapped and tied into bales weighing approximately 500 pounds each. A bale of cotton, when wrapped and tied at the gin, is approximately 5 feet in length, 3½ feet wide, and 4½ feet in height.

By general and uniform custom, bales of cotton from the gin are transported by rail or otherwise as hereinafter described, to compresses. A compress is a combination storage warehouse and plant equipped with machinery designed to press bales of cotton under extremely high pressure, for the purpose of reducing its size. A bale, after compression is only about 18 inches thick, the purpose of compression being that the railroads and carriers by water, in interstate and foreign commerce, as hereinafter described, are enabled thereby to load into cars and ships, for such carriage, approximately three times as much cotton after compression as otherwise would be possible. Approximately 30% of the cotton which is bought and sold upon said market in Greenwood, is transported to the compress hereinafter described by automobile, truck, or wagon, and delivered by that means to said compress. Approximately 70% of said cotton is transported to said compresses by rail on the lines of the Yazoo & Mississippi Valley Railroad Company and the Columbus & Greenville Railroad Company, which are both common carriers engaged in interstate commerce, and which are the only such carriers doing business at said market.

At Greenwood there are three compresses, owned and operated respectively by The Federal Compress & Ware-

house Company, a corporation existing under the laws of the State of Delaware, the Greenwood Compress Company, a corporation existing under the laws of the State of Mississippi, and Union Compress & Storage Company, a corporation, existing under the laws of the State of Tennessee. All of said Companies, with reference respectively to each [fol. 38] of said three compresses, have complied with all of the terms and provisions of an act of Congress, the short title of which is "The United States Warehouse Act", being Chapter 10, Title 7, U. S. C. A. The said companies complied with the terms of said United States Warehouse Act" for the reason that all of said cotton stored in said compresses and warehouses at Greenwood, Mississippi, and handled in the manner hereinafter described, was and is cotton stored and handled therein for interstate and foreign commerce, as will appear from the facts hereinafter recited.

When cotton is delivered to said compresses, the said compress companies issue to the owner thereof warehouse receipts, which receipts comply in all things with the terms and provisions of said Act of Congress. Said cotton is universally and invariably sold upon the market by transfer and delivery of said warehouse receipts in accordance with the terms of said act of Congress, and actual samples taken from said bales of cotton; said warehouse receipts being the evidence of the ownership of said Cotton. When cotton is delivered to the compresses is is graded and classed by persons licensed as classers by the United States Department of Agriculture, unless such grading and classing is waiver by the owner of the Cotton.

At Greenwood there exists an active market for the sale and purchase of said cotton between the farmers raising said cotton and applicant and others engaged in like business, who are purchasing the same with the invariable intention and purpose, as hereinafter alleged, of selling and transporting same in interstate and foreign commerce which is and was and has been a universal custom and course of business for more than 20 years past. The price upon which said cotton is sold upon said market at Greenwood, however, is determined by the value of said cotton upon certain cotton exchanges maintained respectively in the cities of New Orleans, Louisiana, New York, New York, and Liverpool England; and there are maintained in said

City of Greenwood, Mississippi, offices of brokers who re- [fol. 39] ceive daily by wire, for periods of approximately five hours each day, continuous quotations from said exchanges, which fix and determine the price at which cotton is sold upon said Greenwood market. All of said cotton, however, is bought by applicant and others engaged in like business, with the uniform purpose and intention (which is and has been the universal course of business) to transport the same in interstate and foreign commerce to cotton mills located in the states upon the Atlantic seaboard, to-wit: Georgia, South Carolina, North Carolina, and Tennessee; and the mills of the New England states, to-wit: Massachusetts, Rhode Island and Connecticut; and the mills of foreign countries. None of said cotton is spun or utilized within the confines of the State of Mississippi, or sold to or purchased by any consumer within the confines of the State of Mississippi.

As aforesaid, approximately 70% of said cotton is delivered by rail to said compresses at Greenwood, and applicant alleges that, upon the delivery of such cotton to said carriers by rail at points outlying said City of Greenwood, said cotton is thereupon placed in, and thereafter remains, in interstate commerce. Applicant, in this connection, alleges that the said carriers transport, by rail as aforesaid, the said cotton to said compresses at Greenwood, and it is there concentrated merely for the purpose of compression, and for the purpose of awaiting the determination of its final point of destination outside the State of Mississippi, When the destination of said cotton is determined, the said carriers load the same out on shipping instructions of the then owner, after having the said cotton compressed, and charge the through freight rate from the point of origin to the point of destination outside of the State of Mississippi, instead of charging the combined rate for carriage in intrastate commerce from the point of origin to Greenwood, plus the charge for carriage in interstate commerce from Greenwood to the point of destination. The said [fol. 40] charges are made by said carriers in accordance with the regulations prescribed by the Interstate Commerce Commission in pursuance of the act of Congress creating said commission, and the several amendments thereto. So, therefore, plaintiff alleges that 70% of said cotton is actually in the channels of interstate and foreign

commerce at the time of the original purchase of the same. Some growers ship all of their cotton to the compresses by rail as aforesaid; others transport all of their cotton to the compresses by truck, automobile, or wagon; while still others ship a portion of their cotton by rail and transport the remaining portion by truck, automobile, or wagon. In the general and uniform course of business hereinafter described, applicant buys or handles said cotton indiscriminately whether transported to the compresses by rail, or by truck, automobile or wagon, and in order to buy cotton so transported to the compresses by rail he is compelled to buy some cotton transported by truck, automobile, or wagon as aforesaid, for the reason that purchases of such cotton are necessary for the purpose of filing and completing orders which applicant has taken for cotton of particular grades and lengths of staples.

Applicant says that the general and uniform course of business in handling said cotton upon said market is had and done in the following manner:

The grower causes warehouse receipts, when cotton is delivered to the compress, to be issued either directly to himself or his agent, commonly called a cotton factor. Upon the Greenwood market there are a number of such factors and approximately 20 buyers and shippers who are engaged in the sole business of buying and selling, and shipping cotton in interstate and foreign commerce. The farmer or factor causes the actual bales of cotton to be samples, and the cotton is sold to the buyers and shippers upon said market upon the basis disclosed by the character of samples of said cotton, and by the endorsement and delivery of said cotton receipts evidencing the ownership of same, the price therefor being governed as aforesaid, by the markets in New York, New Orleans and Liverpool as aforementioned. [fol. 41] It is uniformly known and understood by the farmer, cotton factor, and buyer that the buyer is purchasing said cotton solely for the purpose of causing the same to be transported by rail and/or water to said points in the United States and foreign countries, where mills convert said cotton into textile products, as aforesaid. No cotton that is bought and/or sold upon the Greenwood market is utilized in the State of Mississippi but all of said cotton, as aforesaid, is transported for consumption in interstate and foreign commerce.

The general course and uniform custom among buyers, shippers and sellers, as well as the general course of busines, is that a buyer first enters into a contract for either the future of immediate delivery of a certain number of bales — cotton of a certain class, grade and staple, obligating himself by such contract to deliver to a mill in a foreign state or country such cotton at a given price. Thereupon, such buyer will go upon said market at Greenwood and purchase cotton of the kind and character which he is obligated to his customer to deliver, and will cause the delivery of said cotton in interstate and/or foreign commerce in accordance with the terms of his contract. A very small proportion of the cotton purchased by shippers and cotton buyers (not exceeding 10%) is bought when no contract for sale therefor exists as hereinabove alleged; but, in such cases, it is bought with the sole anticipation and intention on the part of the buyer (which intention is fully known to the farmer, buyer, and/or factor) to procure a sale of said cotton to a foreign cotton mill or foreign cotton merchants and to cause the same to be transported in interstate and/or foreign commerce as aforesaid, at such time as market conditions will justify. With reference to that proportion (not exceeding 10% as aforesaid) which the buyers purchase when they hold no contract for the sale thereof, applicant says such purchases are only a necessary incident to and concomitant of those purchases which are made for the purpose of filling specific contracts [fol. 42] already entered into by the buyers with mills located in states other than in Mississippi, and in foreign countries. All of such instances arise in cases where the grower insists on offering and selling in one transaction a specified number of bales of cotton of his own selection, and this is the usual and customary manner in which the growers sell their cotton. Without exception, the grades and staples of the lots of cotton offered for sale by the growers, are not uniform as between the various bales of cotton composing such lots. It very frequently happens that a small proportion of a lot of cotton, the purchase of which is contemplated by a buyer, is of a character of grade or staple which buyer cannot use in filling any existing order which he then holds. The buyer, however, cannot fill his orders without buying such lots of cotton, and he must buy such lots in their entirety because the grower will sell no other way. In this way the buyers accumulate

and carry on hand small stocks of cotton, not exceeding 10% of the total amount which they handle, but such accumulations are either sold promptly to other buyers on the Greenwood market who hold orders from mills outside the State of Mississippi for the type of cotton thus incidentally accumulated, or they are shipped by the buyer in interstate and foreign commerce as soon as he can obtain an order therefor in the usual course of his business.

Applicant says that all of his business is conducted in the manner aforesaid, and that such is the usual and ordinary and customary course of business in the buying and selling of cotton in the Mississippi Delta. Applicant says that the aforesaid ordinance of the City of Greenwood, and the statutes of the State of Mississippi under purported authority of which said ordinances were adopted, and all of them, constitute a burden upon interstate commerce, and an unlawful and unconstitutional burden upon the right of plaintiff to engage in such interstate and foreign commerce, and to pursue his occupation as aforesaid, and that the [fol. 43] several terms and provisions of said ordinances and statutes are repugnant to Article 1, Clause 3, of the Constitution of the United States, commonly known as the Commerce Clause thereof, in so far as they apply to applicant's business aforesaid.

H. Chassaniol, Applicant.

Duly sworn to by H. Chassaniol. Jurat omitted in printing.

EXHIBIT "A" TO APPLICATION

Minute Book 12, Page 239

An Ordinance Levying an Annual Tax on Privileges Conducted Within the Limits of the Municipality Known as the City of Greenwood to an Amount Equal to Fifty per Centum of the Annual Tax Imposed on Such Privileges by the State of Mississippi under Chapter 88 of the Laws of Mississippi for 1930 and Providing Penalties

"Be it ordained by the Council of the City of Greenwood, Leflore County, Mississippi:

Section 1. That there is hereby levied an annual tax on privileges carried on and conducted within the limits of [fol. 44] the municipality known as the City of Greenwood

by all persons, firms, corporations, businesses, callings and professions described in and mentioned in Chapter 88 of the Laws of Mississippi for 1930, to an amount equal to fifty per centum of the annual tax levied on privileges described in said Chapter on each person, firm, corporation, business, calling and profession carried on in municipalities of the third class, provided, however, that no such tax shall be levied on any privilege which under the provisions of said act may be duly licensed for state wide purposes, as therein provided.

Section 2. All municipal licenses shall be obtained from the City Clerk and Tax Collector at the City Hall and every person required to obtain a license for the privilege of engaging in any business included in Section 1 of this ordinance shall make application therefor to the City Clerk and Tax Collector, whose duty it shall be to issue a license to such person.

Section 3. All persons liable for privilege taxes who shall fail to procure the license therefor before beginning the business for which a privilege tax is required by the terms of this ordinance, or who shall fail to renew during the month in which it is due the license on a business for which he has theretofore procured a privilege license, shall in each or either instance, be liable for double the amount of the tax required for such business and it is hereby made the duty of the City Tax Collector whose duty it is to collect the tax on such business, to collect the said tax penalties, issue a separate license for the tax for the penalty, and to endorse across the face of the license issued as a penalty the words "Collected as damages"; and the said Tax Collector shall account for all such penalties as required to account for other privilege licenses, provided, however, that the provisions of this ordinance shall not be construed as infringing upon any statutory power of any State officer to collect due and unpaid licenses as now or may be provided for by the laws of the State of Mississippi. In addition to the hereinabove described penalty the delinquent taxpayer shall be guilty of a misdemeanor and [fol. 45] may be fined on conviction an amount not exceeding Fifty Dollars (50.00).

Section 4. The Privilege licenses herein provided shall be and constitute a personal privilege to the person named

therein to conduct the business specified in the license and shall not be transferable to any other person. No change in the name of the firm nor the taking in of a new partner nor the withdrawal of one or more of the firm shall be considered as commencing business but if any one or more of the partners remain in the firm the business shall be regarded as continued.

Section 5. It is the intention of this ordinance to levy an annual privilege tax on all privileges mentioned in and described in Chapter 88 of the Laws of Mississippi for 1930 authorized by said Act to be levied by municipalities having a population of between ten thousand and fifteen thousand inhabitants, being Class Three, in which the municipality of Greenwood is classed, and no privilege tax shall be imposed or levied not so authorized to be imposed and levied by municipalities of the third class according to said act and all exemptions therein mentioned shall be allowed under the terms of this ordinance.

Section 6. That if for any reason any section, paragraph, provision, clause, or part of this ordinance shall be held unconstitutional or invalid that fact shall not affect or destroy any other section, paragraph, provision, clause or part of this ordinance not in and of itself invalid but the remaining portion hereof shall be in force without regard to that so invalidated; and all ordinances in conflict herewith are hereby repealed.

Section 7. That for the immediate and temporary preservation of the public health, peace and safety and for the reasons of providing regular tax on all privileges conducted in the municipality in accordance with the new State Laws, it is ordered that this ordinance be enforced at and from the date of its passage.

Passed and approved this the 3rd day of June, 1930.

John Ashcraft, Mayor. (Seal.)

[fol. 46] Certified by Bonner Duggan, City Clerk.

The foregoing ordinance was introduced by Mayor John Ashcraft, after being reduced to writing, read and considered by sections at a regular and public meeting of the Council of the City of Greenwood, and a vote on its final passage was taken by sections by yeas and nays, which re-

sulted in the following vote by sections and the entire ordinance: Ashcraft, yea, Eliott, yea, and Webb, yea.

Certificate

I, Bonner Duggan, Clerk of the City of Greenwood, Leflore County, Mississippi, do hereby officially certify that the above, foregoing, and attached inst-ument of writing is a true and correct copy of an ordinance of the said City of Greenwood, as the same appears of record in Ordinance Book 3, at pages 241 to 243, of the ordinances of said municipality.

Witness my signature, and the seal of the said City of Greenwood, this the 29th day of November, 1932.

Bonner Duggan, Clerk of the City of Greenwood, Mississippi. (Seal.)

EXHIBIT "B" TO APPLICATION

No. 3007

Privilege Tax License

City of Greenwood, Leflore County, Mississippi

Received of H. Chassaniol the sum of fifty dollars ($50.00) Privilege License to Carry on the Business of Cotton Buyer for a term of one year from Sept. 1st, '31.

Dated at Greenwood, Mississippi, the 1st day of Oct. 1931.

[fol. 47] Countersigned:

Bonner Duggan, City Tax Collector, by H. V. Clark.

The above receipt has written on its face by pen and ink the following notation: "Paid under protest."

EXHIBIT "C" TO APPLICATION

Minute Book 13, Page 597

An Ordinance Levying an Annual Tax on Privileges Conducted Within the Limits of the Municipality Known as the City of Greenwood to an Amount Equal to Fifty per Centum of the Annual Tax Imposed on Such Privileges by the State of Mississippi under House Bill 660 of the Laws of Mississippi for 1932 and Providing Penalties

"Be it ordained by the Council of the City of Greenwood, Leflore County, Mississippi:

Section 1. That there is hereby levied an annual tax on privileges carried on and conducted within the limits of the municipality known as the City of Greenwood by all persons, firms, corporations, businesses, callings and professions described in and mentioned in House Bill #660 of the Laws of Mississippi for 1932, to an amount equal to fifty per centum of the annual tax levied on privilege described in said Chapter on each person, firm, corporation, business, calling and profession carried on in municipalities of the third class, provided, however, that no such tax shall be levied on any privilege which under the provisions of said act may be duly licensed for state-wide purposes as therein provided.

[fol. 48] Section 2. All municipal licenses shall be obtained from the City Clerk and Tax Collector at the City Hall and every person required to obtain a license for the privilege of engaging in any business included in Section 1 of this ordinance shall make application therefor to the City Clerk and Tax Collector, whose duty it shall be to issue a license to such person, and all applicants for a municipal privilege license shall show the number and date of the license that has been issued for state purposes.

Section 3. All persons liable for privilege taxes who shall fail to procure the license therefor before beginning the business for which a privilege tax is required by the terms of this ordinance, or who shall fail to renew during the month in which it is due the license on a business for which

he has theretofore procured a privilege license, shall in each or either instance, be liable for double the amount of the tax required for such business and it is hereby made the duty of the City Tax Collector whose duty it is to collect the said tax penalties, issue a separate license for the penalty, and to endorse across the face of the license issued as a penalty the words "Collected as Damages" and the said Tax Collector shall account for all such penalties as required to account for other privilege licenses, provided, however, that the provisions of this ordinance shall not be construed as infringing upon any statutory power of any State Officer to collect due and unpaid licenses as now or may be provided for by the laws of the State of Mississippi. In addition to the hereinabove described penalty the delinquent tax payer shall be guilty of a misdemeanor for violating the provisions of this ordinance and may be fined on conviction an amount not exceeding $50.00.

Section 4. The privilege licenses provided shall be and constitute a personal privilege to the person named therein [fol. 49] to conduct the business specified in the license and shall not be transferable to any other person. No change in the name of the firm nor the taking in of a new partner nor the withdrawal of one or more of the firm shall be considered as commencing business but if any one or more of the partners remain in the firm the business shall be regarded as continued.

Section 5. It is the intention of this ordinance to levy an annual privilege tax on all privileges mentioned in and described in House Bill #660 of the Laws of Mississippi for 1932 authorized by said act to be levied by municipalities having a population of between ten thousand and fifteen thousand inhabitants being Class Three, in which the municipality of Greenwood is classed, and no privilege tax shall be imposed or levied not so authorized to be imposed and levied by municipalities of the third class according to said act and all exemptions therein mentioned shall be allowed under the terms of this ordinance.

Section 6. That if for any reason any section, paragraph provision, clause or part of this ordinance shall be held unconstitutional or invalid that fact shall not affect or destroy any other ordinance not in and of itself invalid but the remaining portion hereof shall be in force without re-

gard to that so invalidated; and all ordinances or parts thereof in conflict herewith are hereby repealed, especially ordinance entitled "An ordinance levying an annual tax on privileges conducted within the limits of the municipality, known as the city of Greenwood, to an amount equal to fifty per centum of the annual tax imposed on such privileges by the state of Mississippi under chapter 88 of the Laws of Mississippi for 1930, and providing penalties" passed June 3, 1930 and recorded in Ordinance Book 3, page 243.

Section 7. That for the immediate and temporary preservation of the public health, peace and safety and for the reasons of providing regular tax on all privileges conducted in the municipality in accordance with the new State Laws, an emergency is created and it is ordered that [fol. 50] this ordinance be enforced at and from the date of its passage.

Passed and approved this the 7th day of June, 1932.

W. K. Clements, Mayor. (Seal.)

Certified by Bonner Duggan, City Clerk.

The foregoing ordinance was introduced by Mayor W. K. Clements after being reduced to writing, read and considered by sections at a regular and public meeting of the Council of the City of Greenwood, and a vote on its final passage was taken by sections by yeas and nays which resulted in the following vote by sections and the entire ordinance: Mayor W. K. Clements, yea; Commissioner F. H. Smith, yea, and Commissioner B. B. Provine, yea.

Certificate

I, Bonner Duggan, Clerk of the City of Greenwood, Leflore County, Mississippi do hereby officially certify that the above foregoing and attached instrument of writing is a true and correct copy of an ordinance of the said City of Greenwood, as the same appears of record in Ordinance Book 5, pages 26 and 27, of the ordinances of said municipality.

Witness my signature, and the seal of the said City of Greenwood, this the 29th day of November, 1932.

Bonner Duggan, Clerk of the City of Greenwood, Mississippi. (Seal).

EXHIBIT "D" TO APPLICATION

Privilege Tax License

No. 3034

City of Greenwood, Leflore County, Mississippi

Received of Chassaniol & Co. the sum of fifty dollars ($50.00) Privilege License to carry on the business of cot-
[fol. 51] ton buyer for a term of one year from the date hereof.

Dated at Greenwood, Mississippi, the 1st day of September, 1932.

Countersigned:

Bonner Duggan, City Tax Collector, by Lillie Belle Dayton.

The above receipt has written on its face by pen and ink the following notation: "Paid under protest."

Thereupon the original ordinances, certified copies of which are attached to said application as Exhibits "A" and "C", respectively, were by the said applicant offered and introduced in evidence by use of the original ordinance books of said municipality containing said ordinances, and said ordinances were by the Council checked and compared with the aforesaid exhibits and said exhibits were found to be true and correct copies of said ordinances respectively.

Thereupon the said applicant offered and introduced the originals of the two privilege tax license receipts, copies of which are made Exhibits "B" and "D" respectively, to said application, and said receipts were by the board checked and compared with said exhibits and said exhibits were found to be true and correct copies of said receipts.

Thereupon the aforesaid verified application in its entirety, including Exhibits "A", "B", "C" and "D" thereto, was offered and introduced by the said applicant in evidence, and it was agreed — the City Council that the facts alleged in said verified application should be admitted as evidence, and the same were so admitted.

Thereupon the following order by the board was made and entered:

ORDER AS TO ADMISSION OF EVIDENCE

"By agreement with H. Chassaniol, it is ordered that all facts alleged in the verified application of said H. [fol. 52] Chassaniol for refund of privilege license be admitted as evidence."

Thereupon, the City Council, after due consideration of said application and of the aforesaid facts, made and entered the following order:

ORDER DISALLOWING CLAIM OF H. CHASSANIOL FOR REFUND OF PRIVILEGE LICENSE FOR YEARS 1931 AND 1932 FOR DOING BUSINESS AS A COTTON BUYER AND SHIPPER

This day came on for consideration the written application of H. Chassaniol for a refund of privilege license paid to the City of Greenwood for the years 1931 and 1932, for engaging in the business of buying and selling cotton in the City of Greenwood, and the Council having considered said application, doth find that the said refund should not be made, and that the said Claim is not due to the said H. Chassaniol.

It is, therefore, ordered and considered that the claim of H. Chassaniol for privilege license for engaging in the business of buying and selling cotton for the years of 1931 and 1932, be and the same is hereby found not to be due, and said claim is disallowed."

Thereupon it was agreed and consented to by and between the City Council and the applicant that the city clerk shall forthwith transmit this bill of exceptions to the clerk of the circuit court of Leflore County, and that said court may hear and determine the same and enter judgment in vacation, before the next regular term, all with the same effect as if in term time.

Thereupon the said H. Chassaniol, applicant, agreeing and consenting, an order was duly made and entered by the board, as follows:

ORDER TO TRANSMIT BILL OF EXCEPTIONS

"The applicant, H. Chassaniol, agreeing and consenting, it is ordered that the bill of exceptions which he has presented to the Mayor in the matter of his claim for a refund

of privilege licenses alleged by him to have been erroneously paid, payment of which is shown by privilege tax [fol. 53] license receipts Nos. 3007 and 3034, shall, after the same has been signed by the Mayor, be transmitted forthwith by the City Clerk to the clerk of the circuit court of Leflore County, Mississippi, and that said court may hear and determine said cause and enter judgment therein in vacation before the next regular term of said court, and all with the same effect as if in term time."

ORDER SETTLING BILL OF EXCEPTIONS

And for as much as the matters above set forth do not fully appear of record, the applicant tenders this his bill of exceptions and prays that the same may be signed and sealed by the Mayor of said municipality, who is the President of the said City Council, at and during and before any adjournment of the aforesaid regular meeting of said Council, pursuant to the statute in such case made; which is done accordingly, this the 6th day of December 1932.

W. K. Clements, Mayor of the City of Greenwood, Leflore County, Mississippi, and President of the City Council of Said Municipality. (Seal.)

Clerk's certificate to foregoing bill of exceptions omitted in printing.

[fol. 54] IN CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI

In Vacation, 1932

9333

H. CHASSANIOL, Appellant,

vs.

CITY OF GREENWOOD, Appellee

JUDGMENT

Came on this day this cause to be heard by agreement of the parties in vacation on appeal from a judgment of the City Council of the City of Greenwood, Leflore County,

Mississippi, finding not due and disallowing the claim of H. Chassaniol for refund of privilege taxes; and the Court having heard and considered said appeal on the bill of exceptions herein and being fully advised in the premises and being of the opinion that the judgment of the said City Council should be affirmed;

It is, therefore, ordered that said judgment be and the same is hereby affirmed.

Ordered and adjudged, in vacation, this the 10th day of December, 1932.

S. F. Davis, Judge of the Circuit Court of Leflore County, Mississippi.

O. K. A. H. Bell.
O. K. Ward Allen.

Minute Book 10, at page 188.

[fol. 55] Bond on appeal to Supreme Court of Mississippi for $500.00, approved and filed Dec. 12, 1932, omitted in printing.

[fol. 56] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ASSIGNMENT OF ERROR—Filed Jan. 6, 1933

Comes the appellant, by his attorney, and assigns error, as follows:

I

The Circuit Court erred in affirming the order of the Municipal Board of the City of Greenwood, Mississippi, which order found not due and disallowed appellant's claim for a refund of taxes.

Ward Allen, Attorney for Appellant.

I hereby certify that I have this the 4th day of January, 1933, mailed, postage prepaid, to Mr. A. H. Bell, Greenwood, Miss., attorney for appellee, a true copy of this assignment of error.

Ward Allen, Attorney for Appellant.

[File endorsement omitted.]

[fol. 57] IN SUPREME COURT OF MISSISSIPPI

Monday Morning, June 5th, 1933. En Banc. Minute Book B. E., page 199.

30494

W. H. CHASSANIOL

vs.

CITY OF GREENWOOD

30495

R. F. SABIN

vs.

CITY OF GREENWOOD

FINAL JUDGMENT

These causes having been consolidated and submitted at a former day of this term on the record herein from the Circuit Court of Leflore County and this court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgments of said Circuit Court rendered in these causes on the 10th day of December, 1932, be and the same are hereby affirmed. It is further ordered and adjudged that the appellees do have and recover of and from the appellants and B. B. Provine, W. F. Levy, R. F. Sabin and H. Chassaniol, sureties on the appeal bonds herein all of the costs of this appeal to be taxed, etc.

[fol. 58] IN SUPREME COURT OF MISSISSIPPI

En Banc

Numbers 30,494 & 30,495

W. H. CHASANIOL

v.

CITY OF GREENWOOD

R. F. SABIN

v.

CITY OF GREENWOOD

OPINION—Filed June 5, 1933

ETHRIDGE, J.:

These two cases were separately appealed from the Circuit Court of LeFlore County, and involve the constitutionality of certain provisions of Chapter 88, Laws of 1930, and Chapter 89, Laws of 1932. Section 55, of Chapter 88, Laws of 1930, imposes a privilege tax of $25.00 upon each cotton broker who buys and sells cotton, not licensed as a cotton buyer; Section 56 imposes a privilege tax of $100.00 upon every person buying and selling cotton for himself; while Section 58 imposes a tax of $25.00 on each cotton factor or merchant who receives cotton on consignment for sale.

Section 61, Chapter 89, Laws of 1932, imposes a tax of $25.00 on each cotton broker or agent engaged in buying and selling cotton, not licenced as a cotton buyer; Section 62 imposes a tax of $25.00 on every person engaged in buying and selling cotton; Section 64 imposes a tax of $25.00 on each factor or merchant receiving cotton on consignment for sale on which he charges a commission.

The City of Greenwood, under the statute authorizing [fol. 59] it to do so, levied a municipal privilege tax of $50.00, on persons selling and buying cotton, and each of the appellants paid to the City said tax, Sabin having paid without protest, and Chassanoil paid said tax under protest.

Afterwards, the said parties petitioned the City for re-

fund of the amounts so paid, aggregating above $50.00 in each case. The application for a refund was made under the provisions of Section 2591, Code of 1930.

The City of Greenwood denied a refund, and there was an appeal from the order of the City denying same, to the Circuit Court, and, after a full hearing, the Circuit Court also denied the application for refunds to these parties.

By agreement between the City of Greenwood and the appellants, the petition presented to the City authorities was treated as stating the facts. This petition recited that the appellants, Chassanoil and Sabin, were engaged in Greenwood, Mississippi, from Sept. 1st, 1931, to Sept. 1st, 1932, in the business of cotton buyers and sellers; that on June 3, 1930, the municipality adopted an ordinance levying upon said business an annual privilege tax of $50.00 in each case, and, under the color of said ordinance, required appellants to pay for the privilege of conducting this business for one year, as evidenced by receipts. In one case, as above stated, payment was made under protest, and, in the other, without protest: On September 1st, 1932, the municipality required the appellants to pay said tax. It was further recited that the Mississippi Delta, composed of alluvial soil, comprises about 6,650 square miles, and is peculiarly adaptable to grow what is known as "Delta-Type, long staple cotton", recognized throughout the world as being of a superior type, strength and character; that the City of Greenwood is located in the Mississippi Delta, which is exclusively an agricultural community, the prin-
[fol. 60] cipal crop of which is long staple cotton, producing, approximately, 700,000 bales which is more than forty per cent of the total cotton crop in Mississippi. That said cotton is sold upon the open market and constitutes the principal revenue of the entire Delta. It is further recited that by the uniform and general custom bales of cotton are transported by rail or otherwise, to compresses; that a compress is a combination storage warehouse and compres-, and that approximately thirty per cent of the cotton bought and sold upon said market in Greenwood is transported to the compress by automobile, truck or wagon, and approximately seventy per cent is transported to said compresses by rail, on common carriers engaged in interstate commerce; that there are three compresses in Greenwood, all of which comply with all of the terms and provisions

of the "United States Warehouse Act", Chap. 10, Title 7, U. S. C. A., and that cotton is stored and handled therein for interstate and foreign commerce. That when cotton is delivered to the compresses it is graded and classed by persons licensed as classers by the United States Department of Agriculture, unless such grading and classing is waived by the owner. That there is an active market for the sale and purchase of cotton at Greenwood between the farmers raising the cotton, and those purchasing same with the invariable intention and purpose of selling and transporting same in interstate and foreign commerce, and that this has been the universal custom for more than twenty years. The price upon which said cotton is sold is determined by the value of said cotton at certain exchanges in New Orleans, New York, and Liverpool, England, and there are brokers in Greenwood who receive daily by wire quotations from said exchanges fixing and determining the price of cotton at Greenwood. All of said cotton, however, is bought with the uniform purpose to transport same in interstate and foreign commerce to cotton mills located in Georgia, South and North Carolina and Tennessee, and the New England states, none of said cotton being spun or uti- [fol. 61] lized within the confines of Mississippi. It is further recited that when the destination of said cotton is determined, the said carriers load it out on shipping instructions of the owner, and charge the through freight rate from the point of origin to the point of destination, instead of charging the combined rate for carriage in intrastate commerce from the point of origin to Greenwood, plus the charge for carriage in interstate commerce from Greenwood to the point of destination. That some growers ship all of their cotton to the compresses by rail, others transport by truck, automobile or wagon, while still others ship a portion by rail and the remainder by truck, automobile or wagon; and that the buyers purchases or handles cotton indiscriminately, however transported, but, in order to buy, they are compelled to buy some cotton transported by truck or wagon for the reason that such purchases are necessary to fill out and complete orders. It is recited that warehouse receipts are issued by compresses to growers or factors, and that in Greenwood, there are a number of such factors, and the cotton is sold to the buyers and shippers upon the basis disclosed by the samples of

said cotton and by the endorsement and delivery of the warehouse receipts evidencing the ownership of the cotton. It is then recited that the uniform custom among buyers, shippers and sellers, is that the buyer enters into a contract for either the future or immediate delivery of a certain number of bales of cotton of a certain grade, and staple, obligating himself to deliver to a mill in a foreign state or country such cotton at a given price, and that, thereupon, such buyer will go upon said market at Greenwood and purchase cotton of the kind which he is obligated to deliver to his customer, and will cause the delivery of said cotton in interstate or foreign commerce; that a very small proportion of the cotton purchased by shippers (not exceeding ten per cent), is bought when no contract for sale thereof exists; but, in such cases, it is bought with the sole anticipation and intention to procure a sale thereof [fol. 62] to a foreign cotton mill or foreign cotton merchant and to cause the same to be transported in interstate or foreign commerce, for the purpose of filling specific contracts with mills located in foreign states and in foreign countries. That the buyer cannot fill his orders without buying lots of cotton in their entirety because growers will sell no other way, and that, thereby, buyers accumulate small stocks of cotton, not exceeding ten per cent of the amount they handle, being only a necessary incident to and concomitant of those purchases which are made for the purpose of filling specific contracts.

The constitutionality of the Act in question, and of the ordinance of the City of Greenwood, depends upon the construction placed upon the enactment of the statute by the Legislature.

It has long been settled in this State that in construing a statute, a construction will be placed upon it, if reasonably possible, to render it constitutional and to carry out the purpose of the Legislature. It is well known to experienced lawyers, and to the Legislature, that the State has no power to tax interstate commerce; that is, it has no power to impose a tax on the right to engage in interstate commerce. Statutes must be construed then to reflect the evident and manifest purpose of the Legislature to tax intrastate commerce, and not to levy a tax upon that which they have no constitutional power to tax. Many years ago, this court, in Pullman Co. v. Adams, Rev. Agt. 78 Miss. 814, 30

So. 757, 84 Am. St. Rep. 647, held that the Code of 1892, Section 3387, authorizing a privilege tax on each sleeping car of $100.00, and in addition a tax of twenty-five cents a mile for each mile of railroad over which it runs, affected only the business done in the State, and was not unconstitutional as interfering with interstate commerce. That under this statute the company could not take out a license [fol. 63] or pay a tax for doing interstate business, and that the statute was valid.

This case was a stronger case for holding that interstate business is not taxable than the one we have before us, because Section 195 of the Constitution declares that sleeping cars are common carriers. In that case, in the Mississippi report, Vol. 78, page 829, Judge Whitfield, speaking for the court, said:

"The whole purpose of this statute, from its terms, manifestly is to require a privilege tax to be paid for doing business within this State, and for that business alone. It relates exclusively to the local business done by the Pullman Company with in this State. It does not require any tax be paid for the privilege of doing the interstate business of the company. It does not, in any manner, affect its interstate business. 'It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state' "; citing Osborne v. Florida, 164 U. S. 650, as decisive of this case, The case of Pullman v. Adams, supra, was appealed to the Supreme Court of the United States, and is reported in 189 U. S. 419, 23 S. C. 494, 47 L. Ed. 877.

Our court had occasion later to construe another statute levying a privilege tax upon railroads engaged in intrastate commerce See N. O. M. and C. R. R. Co. v. State, 110 Miss. 290, 70 So. 355. This case involved the imposition, by Chapter 102, Laws of 1912, of a tax, and the court held that the privilege tax there imposed was for doing purely intrastate business, saying as follows: "The tax for the privilege of doing business in Mississippi is upon the mileage of railroads in Mississippi, and not only is this true, but the Legislature, in an apparent effort to be reasonable, has fixed the maximum rate per mile, and consequently a maximum amount beyond which the tax in no case could

run. In this regard, it falls within the principle announced [fol. 64] by the supreme court of the United States in Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 34 Sup. Ct. 15; 58 L. Ed. 127, as follows, 'So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. Insofar as it is represented in the authorized capital stock, it is used only as a measure of taxation, and as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable.'" On page 305, the court said, "We cannot give to general provisions of any statute a meaning that would lead to absurdity, or that would convict the Legislature of attempting to deal with a subject clearly beyond its jurisdiction. The spirit and reason of the law certainly prevail over the strict letter. Furthermore, there is room for applying the words 'gross earnings' in this statute to the gross earnings derived from the intrastate business, and not to the gross earnings of the entire system of an interstate railroad."

These cases cited were decided by this court many years ago, and the Legislature must have been familiar therewith, and must have relied upon them in the use of the general language it used. This rule of construction is perfectly sound, and we are sure that it was the purpose of the Legislature to limit the tax here imposed upon intrastate commerce.

In passing upon the constitutionality of a statute, we cannot accept as binding agreements that are merely conclusions from facts, nor can we accept the understanding of the parties litigant as to the general course of business dealing. These agreements may suffice to settle the rights of the parties between themselves, but they cannot overturn the statutes. The Legislature has facilities and opportunities for knowing business customs and conditions within the State. There is, in fact, much buying and selling of cotton in this state that is, in no sense, interstate [fol. 65] commerce, and the Legislature knew this to be true. Cotton is a great commodity of this State and is bought and sold by people engaged in intrastate business to a considerable degree, at a considerable profit. The State raises a considerable revenue from the privilege taxes. The activities of the State and its subordinate divi-

sions are vastly important, and, in recent years, the State has been forced to schemes of taxation to raise revenue that formerly did not exist. But, through many years, the privilege taxes have consfituted an important element of the State's revenue system.

Under the agreed facts, there is a considerable portion of cotton business at Greenwood that is intrastate, rather than interstate, commerce. It is agreed that thirty per cent of the cotton brought into Greenwood and stored there is brought in by trucks, automobiles and wagons, and not placed in interstate commerce at the time it is stored in the warehouses, nor, in any sense, consigned to any person for shipment in interstate commerce when sales are made. The Supreme Court of the United States has held as to cotton so stored that it does not become a part of interstate commerce. The beginning of interstate commerce is the time when the goods begin their interstate journey thus passing beyond the state's authority into domestic or Federal control. Lemke v. Farmers Grain Co., 258 U. S. 50, 60 L. Ed. 458, 42 S. C. 244; Schafer v. Farmers Grain Co., 268 U. S. 189, 69 L. Ed. 909; General Oil Co. v. Crain, 209 U. S. 211, 52 L. Ed. 754; McCluskey v. Money, 243 U. S. 36, 61 L. Ed. 579; Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101.

The essential character of commerce, not the accident of through bills of lading, is its continuity of movement in foreign commerce, and that determines Federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country. R. R. Commission v. Texas and P. R. Co., 229 U. S. 336, 57 L. Ed. 1215. See also I. C. R. R. Co. v. DeFuentes, 236 U. S., 59 L. Ed. 517 and R. R. Co. v. Worthington, 225 [fol. 66] U. S. 101, 56 L. Ed. 1004.

In the case of Superior Oil Co. v. Mississippi, 280 U. S. 390, 74 L. Ed. 507, it was held that the sale of gasoline was not converted into an interstate transaction so as to render inapplicable a state gasoline sales tax, by the fact that the gasoline is transported on boats operated by the purchaser into another state, for resale there, under a so-called bill of lading, naming the purchaser as consignee and reciting that the gasoline should remain the property of the seller until delivered to consignee or his agent at the point of

destination, since it was optional with the purchaser whether he would carry it out of the state or not.

In the case before us, as to the thirty per cent that is transported by trucks and wagons or other private conveyances and placed in storage in Greenwood, and not consigned to any one outside the State, nor sold to any one outside the State, the property is not in interstate commerce. The owner might withdraw it, or sell it, whenever he pleases.

The transaction is to be determined by its facts, and not by a fantastic and far fetched consideration.

In the case of Superior Oil Co. v. Mississippi, 280 U. S. 393, 74 L. Ed. 507, in the course of the opinion the court said; "The document hardly can affect the case because 'it is not within the power of the parties, by the form of their contract to convert what was exclusively a local business, subject to State control, into an interstate commerce business protected by the commerce clause (Browning v. Waycross, 233 U. S. 16, 58 L. Ed. 828, 34 Sup. Ct. 578); at least, when the contract achieves nothing else. The importance of the commerce clause to the Union, of course, is very great. But it also is important to prevent that clause being used to deprive the states of their lifeblood by a strained interpretation of facts."

In the case of Lawrence v. Tax Commission, 286 U. S. [fol. 67] 276, 52 S. C. 556, 76 L. Ed. 1102, the Supreme Court of the United States held that the Federal Constitution, apart from the specific grant to the Federal Government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, leaves the states unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the state, or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment. It is true that this case did not involve a privilege tax, but an income tax; however, the principle that the state can levy taxes on privileges enjoyed therein is applicable here where the transaction applies, as we hold it does, to intrastate business alone. See State v. G. M. & N. R. Co., 138 Miss. 70, 104 So. 689; Coe v. Erroll, 116 U. S. 517, 29 L. Ed. 715; Carson Petroleum Co. v. Vial, 279 U. S. 94, 73 L. Ed. 626; Nashville C. & St. L. R. Co. v. Wallace, 77 L. Ed., Advance Sheets, 444.

The appellants rely strongly upon the case of Bowman v. Continental Oil Co., 256 U. S. 642, 41 S. C. 606, 65 L. Ed. 1139; but in that case the general language of the statute had not been interpreted by the state court so as to limit the privilege tax there enacted to intrastate commerce. The court, in the absence of a construction by the state court, held that the general language covered both intrastate and interstate commerce, and that the act was not acceptable.

The meaning of a statute is for the determination of a state court, and the federal courts are bound by the *the* construction of the state court. Anglo-Chilean Nitrate Sales Corp. v. Ala, 77 L. Ed., Advance Sheets, page 451. Sec. U. S. Dig. (L. Coop. Co.) "Courts", sec. 789. Our construction accords with former decisions of our own State upon the construction of statutes.

[fol. 68] The Lemke and Shafer cases (the Dakota grain cases) supra, relied upon by the appellants, are easily differentiated from the case before us. In those cases the state law undertook to place certain requirements on grain shipments, and thus imposed stringent regulations calculated to embarrass and impede the shipment of grain from the state.

The cases relied upon by the appellants can all be differentiated from the case before us. It does not matter whether the intrastate business done was nearly equal to the interstate business, the state's control over the intrastate business is full and complete, subject only to the provisions of the Federal Constitution. The powers of the state, not given to the United States government by the Federal Constitution, are reserved to the state or the people. The state constitutes an essential unit in the federal scheme, and the state should not be embarrassed in the operation of its functions within its sphere, but should be left to discharge those functions according to its own conception thereof. This nation, as it was founded, cannot exist without the states fulfilling their proper functions in the scheme. The importance of the powers and rights of the states have not been magnified, and have been frequently overlooked. The power of the state is not restricted except by the Federal Constitution or the State Constitution.

That which is inherent in intrastate commerce does not lose its essential nature when it becomes a part of transactions in interstate commerce. Foote Mfg. Co. v. Collen, 247 U. S. 21, 62 L. Ed. 693.

The constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. This country is an indestructible union of indestructible states. Coyle v. Smith, 221 U. S. 559, 55 L. Ed. 853; White v. Hart et al., 80 U. S. 646, 20 L. Ed. 685. In Texas v. White, 7 Wall. 700, 19 L. Ed. 227, it was held that if a state would exercise its sovereign [fol. 69] power, then it must be permitted to exercise its legitimate power in all legitimate ways.

When considered in the light of these authorities, the agreement entered into between the City of Greenwood and the appellants does not, on its facts, make a case which taxes interstate commerce. If the court should make mistakes in applying the State law as to what interstate commerce is, it does not affect the statute before us. The intention of the Legislature was not to tax interstate commerce, and whether administrative officers or judicial bodies err in determining a particular transaction not to be interstate commerce, does not affect the statute itself, but only involves a misapplication of the statute.

We find no reversible error and the judgment will be affirmed.

Affirmed.

[File endorsement omitted.]

[fol. 70] IN SUPREME COURT OF MISSISSIPPI

En Banc

Nos. 30,494 & 30,495

W. H. CHASSANOIL

vs.

CITY OF GREENWOOD

R. F. SABIN

vs.

CITY OF GREENWOOD

DISSENTING OPINION—Filed June 5, 1933

ANDERSON, J., dissenting:

The facts of these cases were not agreed to, but are not in dispute. Appellee offered no evidence at the conclusion of appellants' but agreed that appellants' petition for the refund of the taxes, and the exhibits thereto, should be admitted in evidence. This was done and constituted all the evidence in the case.

The outstanding and controlling facts are that all the long staple cotton produced in this state ultimately goes into interstate commerce, none of it is manufactured within the borders of the state. The long staple cotton produced in the Greenwood territory is concentrated at three compresses in Greenwood for the purposes of compression, sale and shipment in interstate commerce. Appellants and other cotton buyers at Greenwood purchase the cotton from the producers and merchants who own it to fill contracts of sale theretofore made by them to mills and other buyers in other states and foreign countries; in doing so, they are forced to purchase something like an average of ten per cent more cotton than is necessary to fill their contracts. This results from the fact that the owners of the cotton are not willing to split their sales so as to meet the requirements of the purchasers as to number of bales, class and grade. This average of ten per cent is sold by the buyers in the local market at Greenwood; it is generally purchased by other buyers to fill foreign contracts. The result is that ninety per cent of the cotton purchased by appellants and other cotton buyers at Greenwood is purchased to fill [fol. 71] foreign contracts of sale, and the balance of ten per cent is sold by them locally, as above stated. The facts demonstate that the foreign business cannot be carried on without, at the same time, conducting the local business. That is true because they are so integrated into each other as to be inseparable.

The City of Greenwood, as it was authorized to do by statute, passed an ordinance, the provisions of which are indicated by its title in this language: "An ordinance levying an annual tax on privileges conducted within the limits of the municipality known as the City of Greenwood to an amount equal to fifty per centum of the annual tax imposed on such privileges by the state of Mississippi under Chap-

ter 88 of the Laws of Mississippi for 1930, and providing penalties". By section 3 of the ordinance section 225 of Chapter 88 of the Laws of 1930 was adopted. This action by the municipality was authorized by section 2549, Code of 1930, which provides, in substance, that all offenses under the penal laws of the state which are misdemeanors shall, when so provided by general ordinance of the municipality, be offenses against the municipality when committed within its corporate limits, and upon conviction thereof the same punishment shall be imposed by the municipality as is provided by the laws of the state with regard to such offenses against the state, but not in excess of the maximum penalty which may be imposed by municipal corporations.

Section 3 of the ordinance is in this language:

"All persons liable for privilege taxes who shall fail to procure the license therefor before beginning the business for which a privilege tax is required by the terms of this ordinance, or who shall fail to renew during the month in which it is due the license on a business for which he has theretofore procured a privilege license, shall in each or either instance, be liable for double the amount of the tax required for such business and it is hereby made the duty of the City Tax Collector whose duty it is to collect the tax [fol. 72] on such business, to collect the said tax penalties, issue a separate license for the tax for the penalty, and to endorse across the face of the license issued as a penalty the words 'Collected as Damages', and the said Tax Collector shall account for all such penalties as required to account for other privilege licenses, provided, however, that the provisions of this ordinance shall not be construed as infringing upon any statutory power of any State officer to collect due and unpaid licenses as now or may be provided for by the laws of the State of Mississippi. In addition to the hereinabove described penalty the delinquent tax payer shall be guilty of a misdemeanor and may be fined on conviction an amount not exceeding Fifty Dollars (50.00)."

Before getting down to the exact question involved it would be very well to have in mind the surrounding principles as declared by the Supreme Court of the United States. A product may be a part of interstate commerce before it begins its actual physical journey therein. Where goods are purchased in one state for transportation to an-

other, the purchase is interstate commerce quite as much as the transportation. Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 66 L. Ed. 239, 42 Sup. Ct. Rep. 106. The buying and selling of goods for shipment beyond state lines is interstate commerce notwithstanding that after the purchase some of the goods may be sold in local markets. Lemke v. Farmers' Grain Co., 258 U. S. 50, 66 L. Ed. 458, 42 Sup. Ct. Rep. 244. The carrying of goods from one state to another, as the result of orders previously received from the originating state, is interstate commerce, and is not subject to license fees imposed by the state into which they are shipped. Wagner v. Covington, 251 U. S. 95, 64 L. Ed. 157, 40 Sup. Ct. Rep. 93. The buying of grain in one state for shipment to markets in another state, if followed by such shipment, is interstate commerce. Shafer v. Farmers' Grain Co., 268 U. S. 189, 69 L. Ed. 909, 45 Sup. Ct. Rep. 481. The negotiation for the sale of goods which [fol. 73] are in another state for the purpose of introducing them into the state into which the negotiation is made is interstate commerce. Crenshaw v. Ark., 227 U. S. 389, 57 L. Ed. 565, 33 Sup. Ct. Rep. 294; Weeks v. U. S., 245 U. S. 618, 62 L. Ed. 513, 38 Sup. Ct. Rep. 219. The sale and delivery of coal f. o. b. cars at the mine for transportation to purchasers in other states is interstate commerce. Pa. R. Co. v. Sonman, 242 U. S. 120, 61 L. Ed. 188, 37 Sup. Ct. Rep. 46. The right to solicit or take orders for interstate commerce business is a part of interstate commerce, and not subject to state regulation. Vance v. Vandercook, 170 U. S. 438, 42 L. Ed. 1100, 18 Sup. Ct. Rep. 674. Where a commodity is a part of an actual constant and flowing stream out of a state from which the owner may draw part of it for use in the state before reaching the state border, a tax on the flow is a burden on interstate commerce which the state cannot impose. Such a flow in interstate commerce is a reasonable class of business. Stafford v. Wallace, 258 U. S. 495, 66 L. Ed. 735, 42 Sup. Ct. Rep. 397, 23 A. L. R. 229. A tax on flowing commerce does not become valid and constitutional because it applies to domestic commerce as well. Crew-Levick Co. v. Pa. 245 U. S. 292, 62 L. Ed. 295, 38 Sup. Ct. Rep. 126. A person cannot be required to pay a state line tax for the mere privilege of carrying on interstate or foreign commerce. Sault, etc. v. International Transit Co., 234 U. S. 333, 58 L. Ed. 1337, 34 Sup. Ct. Rep. 826; Crutcher v. Ky., 141 U. S. 47, 35 L. Ed. 649, 11 Sup. Ct. Rep. 851.

Now coming directly to the question involved, the case of Bowman v. Continental Oil Co., 256 U. S. 642, 65 L. Ed. 1139, 41 Sup. Ct. Rep. 606, is decisive of the question—it is squarely in point. The principles there laid down govern; there is no escape. The ordinance in question imposes an unconstitutional burden on interstate commerce. A statute of the state of New Mexico imposed an excise tax of two cents for each gallon of gasoline sold or used, and an [fol. 74] annual license tax of Fifty Dollars for each distributing station or place of business. The Continental Oil Company was engaged in both domestic and interstate business, 94.5 per cent of its business was intrastate and the balance, 5.5 per cent, was interstate. The Supreme Court held the gallonage tax of two cents valid as to domestic business and invalid as to interstate business, basing its decision, as I understand it, upon the ground that the two classes of business were separable—one could be carried on without the other. However, as to the privilege license of Fifty Dollars, the court held that the two classes of business could not be separated, that by the terms of the statute and its legal operation and effect this tax was imposed generally upon the entire business conducted, including interstate commerce as well as domestic, and that the tax was therefore void. The court used this language in deciding the case:

"The act, in its 2d section, requires every distributor of gasolene to pay an annual license tax of $50 for each distributing station or place of business or agency; requires it to be paid in advance; and renders it unlawful to carry on the business without having paid it. Section 8 declares that any person who shall engage or continue in the business of selling gasolene without a license shall be deemed guilty of a misdemeanor, and, upon conviction, be punished by fine or imprisonment, or both. The subject taxed is not in its nature divisible, as in the case of the excise tax. The imposition falls upon the entire business indiscriminately; and so does the prohibition against the further conduct of business without making the payment. By accepted canons of construction, the provisions of the act in respect of this tax are not capable of separation, so as to confine them to domestic trade, leaving interstate commerce exempt. United States v. Reese, 92 U. S. 214, 221, 23 L. ed. 563, 565; Trade-Mark Cases, 100 U. S. 82,

99, 25 L. ed. 550, 553; Poindexter v. Greenhow, 114 U. S. 270, 304, 305, 29 L. Ed. 185, 197, 198, 5 Sup. Ct. Rep. 903, 962; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, [fol. 75] 636, 39 L. e. 1108, 1125, 15 Sup. Ct. Rep. 912.

"No doubt the state might impose a license tax upon the distribution and sale of gasolene in domestic commerce if if did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasolene indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence, it cannot be enforced at all."

The ordinance of the City of Greenwood, as did the New Mexico statute, requires the payment of the license tax in advance, renders it unlawful to carry on the business without the payment of the tax and provides that any person engaging in the business without obtaining the license is guilty of a misdemeanor, and on conviction subject to fine and imprisonment, or both, and in addition provides that he shall pay double the amount of the tax required.

Lemke v. Farmers' Grain Co., 258 U. S. 50, 66 L. Ed. 458, 42 Sup. Ct. Rep. 244, also strongly supports the contention of appellants. It was held in that case that the business of buying grain in North Dakota, practically all of which was intended for shipment to and sale at terminal points in other states conformable to the usual and general course of business in the grain trade, was interstate commerce which a state could not regulate by a statute having the effect of burdening such commerce. The court held further that the essential feature of a state statute could not be eliminated by the courts for the purpose of saving the constitutionality of other parts of the [fol. 76] statute.

The cases referred to and relied on in the majority opinion to sustain the legality of this tax are not in point,

for in each of those cases the domestic and interstate business were separable, and the tax imposed, therefore, could be and was allocated to the domestic business, and left the interstate business untouched. That is not true of the tax here. The two classes of business are inseparable, the foreign commerce could not be carried on without the domestic business, the latter was a concomitant. The tax cannot be laid alone against the domestic business—the overage of ten per cent—for in taxing that the interstate business is necessarily taxed, for the simple reason that it cannot be carried on without this overage. In other words, under the facts in this case the overage is as much a part of the interstate commerce as the ninety per cent. Appellants had the right, and did everything in their power, to carry on interstate commerce exclusively, but under the conditions existing they could not do so without carrying along this overage of ten per cent. This being true, the state could not tax one without taxing the other. If the state could reach down into the stream of interstate commerce and dip out the domestic business for state regulation without hampering the free flow of the stream, its regulation would be valid. On the other hand, if the separation of the domestic business from the foreign would interfere with the free flow of the stream, the action of the state would be illegal.

[File endorsement omitted.]

[fol. 77] IN SUPREME COURT OF MISSISSIPPI

Monday Morning, June 12th, 1933. En Banc. Minute Book B. E., page 210

30494

H. CHASSANIOL

vs.

CITY OF GREENWOOD

JUDGMENT ON SUGGESTION OF ERROR

This cause this day came on to be heard on the suggestion of error filed herein and this court having suffi-

ciently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

[fol. 78] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 79] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO RECORD—Filed Sept. 5, 1933

Pursuant to Rule 13, Subdivision (9), the appellants rely upon the following points:

1. That the State court erred in holding that the City of Greenwood was not liable to the appellant, H. Chassaniol, for all privilege taxes herein sought to be recovered, in this, that:

(a) The appellant was engaged solely and exclusively in interstate commerce, and the tax sought to be recovered by appellant by the terms of its imposition taxed the privilege of engaging in such commerce.

(b) That said tax was severable.

2. That the ordinances imposing said tax and the statutes authorizing the said ordinances are as to said tax in contravention of the commerce clause of the Federal Constitution, in this, that that done by appellant, H. Chassaniol, was and is interstate commerce, and of him was exacted a privilege tax for doing that which under the Constitution he had a right to do freed therefrom.

3. That the record herein presented shows conclusively specific facts wherefrom it demonstrably appears that appellant as to that done was engaged solely in interstate commerce, and therefor was unconstitutionally taxed.

4. The Supreme Court of the State of Mississippi, being the highest court wherein this question of statutory construction might be had, denied the contention of appellant, [fol. 80] H. Chassaniol, that his business was interstate

commerce, and erroneously held that the business by him done as hereinafter reflected was taxable by the State of Mississippi as intrastate commerce, and that the ordinances and statutes were valid in virtue thereof.

5. The Supreme Court of the United States, in determining what is interstate commerce and what may be taxed by the State exercises a Federal function, which is not in any way dominated by State decisions.

6. Appellants aver that Section 56, Chapter 88, Laws of 1930, providing:

"Every person engaged in the business of buying or selling cotton for himself shall pay a privilege tax of one hundred ($100.00) dollars; but, where a cotton buyer only buys cotton from one gin in only one county or buys from the producers in only one municipality, said privilege tax is twenty-five dollars ($25.00); the license must be issued in his name; and may be paid on or before the first day of September for a full year; only the municipality of his residence can collect a municipal privilege tax of him. Every individual, firm, partnership or corporation engaged in the business of buying or selling cotton shall take out in his or their name a state privilege tax of twenty-five dollars ($25.00) for every employee engaged in their business as buyer or seller, on or before the first day of September; such privilege tax shall authorize the buying or selling cotton by its bearer; and it shall be unlawful for any employee to buy or sell cotton without a privilege tax in his possession, issued in the name of his employer. Such licenses cannot be issued for less than a year. If the individual, firm, partnership, or corporation take out a municipal privilege in his or their name for the municipality of the residence of their employee and take out also, the state privilege tax imposed on them above, such employee shall have the authority to buy or sell cotton in any other municipality of the state, without paying any further state [fol. 81] or municipal privilege tax. But the above privilege taxes shall not be required of any landlord or other person who receives cotton in payment of accounts due him, nor of any merchant who pays a privilege tax on a store and who purchases only from the producer at the place of business of such merchant, nor to cotton mills

domiciled in Mississippi where the cotton is purchased for manufacturing purposes."

contravenes the commerce clause of the Federal Constitution, and that the municipal ordinance adopted by the City of Greenwood imposing the tax thereunder authorized is void, insofar as the business of appellant, H. Chassaniol, is concerned.

7. Appellants aver that Section 62, Chapter 89, Laws of Mississippi of 1932, providing:

"Upon every person engaged in the business of buying or selling cotton for himself, as follows:

When less than 2,500 bales are handled annually—$25.00.
When 2,500 bales and less than 5,000 are handled annually—$50.00.
When 5,000 bales or more are handled annually—$100.00.
Upon each person buying or selling cotton as an agent for a licensed cotton buyer—$25.00.

"But this section shall not apply to any landlord, merchant, or other person who only receives cotton in payment of accounts due him, or to cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes."

contravenes the Commerce Clause of the Federal Constitution, and that the municipal ordinance adopted by the city of Greenwood imposing the tax thereunder authorized is void, insofar as the business of appellant, H. Chassaniol, is concerned.

In order to adequately present the aforesaid points, you will please print the following, as listed in the præcipe:

(1) Appellant's bill of exceptions to the action of the City Council of the City of Greenwood upon his application for a refund of taxes.

[fol. 82] (2). Final judgment of the Circuit Court of Leflore County.

(3) Appeal bond to the Supreme Court of Mississippi.

(4) Assignment of errors in Supreme Court of Mississippi.

(5) The judgment and opinions of the Supreme Court of Mississippi, including the dissenting opinion of Justice Anderson.

(6) Judgment of Supreme Court of Mississippi on suggestion of error.

(7) Appellate proceedings.

Edward W. Smith, Ward Allen, Marcellus Green, Samuel Green, for Appellants.

Service of the foregoing is hereby duly admitted, and counsel for the appellee agrees that the record may be printed as above requested, without waiting for any counter designation.

Dated this 9th day of August, 1933.

—— L. Rice, Attorney General of the State of Mississippi, by J. A. Lauderdale, Asst., A. H. Bell, W. S. Vardaman, Jr., Attorneys for Appellee.

Filed 8/12/33. Tom Q. Ellis, Clerk. E. L. Shelton, D. C.

[fol. 83] [File endorsement omitted.]

Endorsed on cover: File No. 38,031. Mississippi Supreme Court. Term No. 428. H. Chassaniol et al., appellants, vs. City of Greenwood. Filed September 5, 1933. No. 428, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 428

H. CHASSANIOL ET AL., APPELLANTS,

vs.

CITY OF GREENWOOD, APPELLEE.

STATEMENT AS TO JURISDICTION.

A.

Statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States of the above styled cause.

Appellants: H. Chassaniol, and B. B. Provine, R. F. Sabin, and W. F. Levy, sureties on the said H. Chassaniol's appeal bond in the State court:

Appellee: City of Greenwood, a Mississippi municipal corporation.

Appellee, acting under the authority of the statutes of the State of Mississippi, exacted of the appellant, H. Chassaniol, a privilege tax as a condition precedent to appellant engaging in the business of a cotton buyer. This privilege tax was paid by the appellant under protest, and the appellant seeks to recover the amount so paid upon the ground that he is engaged in interstate commerce and that

the privilege tax levied and collected constitutes a direct burden upon interstate commerce, contravening Article 1, Section 8, Clause 3, of the Federal Constitution, and that the said State statutes and municipal ordinances levying said privilege tax are therefore void in so far as they affect the business of and apply to the appellant. The decision of the City Council of the City of Greenwood, Mississippi, and the decision of the Circuit Court of Leflore County, Mississippi, being adverse to appellant, the appellant appealed to the Supreme Court of Mississippi, attacking as invalid and unconstitutional the statutes and ordinances hereinafter quoted, levying said privilege taxes, on the ground that they and each of them were repugnant to the Constitution of the United States. The judgment of the Supreme Court of Mississippi, the highest court of Mississippi in which this question might be determined, was in favor of the validity of said statutes and ordinances and each of them, and said court denied the Federal right claimed. Justice Anderson dissented.

This appeal is taken under Section 237 Judicial Code, as amended, the same being Section 344, of Title 28, U. S. C. A., and under Section 861-A, Title 28, U. S. C. A. The decisions sustaining the jurisdiction of the Supreme Court of the United States of appeals to determine the invalidity of a state statute and/or municipal ordinance averred to contravene the Federal Constitution where the highest court of the State sustains the statute and/or ordinance and denies the Federal right are:

John B. King Manf'g Co. v. *City Council of Augusta, et al.*, 277 U. S. 99;

Nashville, C. & St. L. Ry. v. *White*, 278 U. S. 456;

Great Northern Railway Co. v. *State of Minnesota*, 278 U. S. 503;

State v. *Interstate Natural Gas Co.*, 284 U. S. 41.

B.

The statutes of the State of Mississippi whose constitutionality is challenged in this cause, are:

1. Section 56, of Chapter 88, Mississippi Laws of 1930. (See page 8, of the appendix hereto, for the full text of this statute.)

2. Section 62, of Chapter 89, Mississippi Laws of 1932. (See pages 8-9, of the appendix hereto, for the full text of this statute.)

3. Section 2445, Mississippi Code of 1930. (See page 9, of the appendix hereto, for the full text of this statute.)

The two ordinances of the City of Greenwood, Mississippi, whose constitutionality is challenged in this cause, are:

1. An ordinance of the City of Greenwood, approved February 3, 1930, appearing in Minute Book 12, at page 56, of the Minutes of the City of Greenwood. (See page 9, of the appendix hereto, for the full text of this statute.)

2. An ordinance of the City of Greenwood, approved June 7, 1932, and appearing in Minute Book 13, at page 597, of the Minutes of the City of Greenwood. (See page 12, of the appendix hereto, for the full text of this statute.)

The payment of the privilege tax assessed by the statutes above referred to was made a condition precedent to engaging in the business of a cotton buyer, and a failure to pay such privilege tax made the cotton buyer subject to the penalties set forth in Section 225, of Chapter 88, Mississippi Laws of 1930. (See pages 14-15, of the appendix hereto, for the full text of this statute.)

Section 3 of each of the two ordinances of the City of Greenwood, Mississippi, above referred to adopts Section 225, Chapter 88, Mississippi Laws of 1930. (See pages 14-15, of appendix hereto, for full text of this statute.) This action by the City of Greenwood was authorized by Section 2549, Mississippi Code of 1930. (See page 15, of appendix hereto, for the full text of this statute.)

C.

The judgment of the Supreme Court of Mississippi in this case, which is the judgment sought to be reviewed on appeal to the Supreme Court of the United States, was rendered on May 6, 1933. This judgment became final on June 5, 1933, upon which date judgment was entered adverse to appellant's suggestion of error. The appellant's petition for an appeal of this cause to the Supreme Court of the United States was presented to Honorable Sydney Smith, Chief Justice of the Supreme Court of Mississippi, on the 9th day of August, 1933, on which day the appeal was allowed.

D.

Statement of Case.

The Mississippi Delta, composed of alluvial soil, comprises about 6,650 square miles, and is peculiarly adapted to the growing of Delta-Type long staple cotton, recognized throughout the world as being of a superior type, strength and character. All of the long staple cotton produced in Mississippi ultimately goes into interstate commerce, none of it being utilized in the State of Mississippi. The City of Greenwood is located in the Mississippi Delta and there exists in said city an extensive market for long staple cotton, the price of which is fixed in Greenwood by quotations

from cotton exchanges located in New Orleans, New York and Liverpool, England. The long staple cotton produced in the Greenwood territory is concentrated at three compresses in Greenwood for the purposes of compression, sale and shipment in interstate commerce. The three compresses in Greenwood have all complied with the terms and provisions of United States Warehouse Act, Chapter 10, Title 7, U. S. C. A. (Section 241 *et seq.*), and when the cotton is delivered to said compresses it is graded and classed by persons licensed as classers by the United States Department of Agriculture. Approximately 30 per cent of the cotton sold upon the Greenwood market is transported to the compress by automobile, truck or wagon, and approximately 70 per cent is transported to said compresses by common carriers engaged in interstate commerce. After the cotton has been placed in said compresses and warehouse receipts have been issued therefor, the appellant, H. Chassaniol, and other cotton buyers at Greenwood, proceeding according to the uniform and long established course of business, purchase the cotton from the producers and merchants who own it for the purpose of filling contracts of sale theretofore made by them to mills and buyers in other States and foreign countries, no sales being made to purchasers in Mississippi. In purchasing this cotton the appellant and other buyers are forced to purchase an average of 10 per cent more cotton than is necessary to fill their contracts for the reason that the owners of the cotton are not willing to split their sales so as to meet the requirements of the purchasers as to the number of bales, class and grade. This overage of 10 per cent is sold by the appellant and other cotton buyers in the local market at Greenwood to other buyers who utilize it in filling their foreign contracts, or it is shipped by the appellant and other buyers to fill orders in foreign states and countries

made after its purchase by them. All of this cotton is purchased by the appellant and the other buyers with the invariable intention of shipping to other States and foreign countries. When the destination of said cotton is determined, the common carriers load it out on shipping instructions of the owner and charge the through freight rate from the point of origin to the point of destination, instead of charging the combined rate for carriage from the point of origin to Greenwood, plus the charge for carriage from Greenwood to the point of destination outside of Mississippi.

It is the contention of the appellant that he is engaged in interstate commerce and that the privilege tax statutes and ordinances heretofore set out are, insofar as they apply to him, a tax upon interstate commerce and therefore unconstitutional.

Among other cases the appellant states that the following cases sustain his contention in regard to the interstate character of his business of cotton buyer and in regard to the unconstitutionality of the statutes and ordinances levying the privilege taxes complained of, to-wit:

Lemke v. *Farmers' Grain Co.*, 258 U. S. 50;
Shafer v. *Farmers' Grain Co.*, 268 U. S. 189;
Stafford v. *Wallace*, 258 U. S. 495;
Bowman v. *Continental Oil Co.*, 256 U. S. 642;
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282;
Wagner v. *Covington*, 251 U. S. 95;
Young v. *Hiawatha Gin & Mfg. Co.*, 17 Fed. (2d) 193.

See record in *Matthews* v. *Rodgers*, Number 84 at October Term, 1931, of the Supreme Court of the United States, with special reference to the final decree by the District Court, composed of three judges, enjoining the collection

of the identical tax here complained of, under identical circumstances.

A. G. S. Ry. Co. v. *McFadden,* 232 Fed. 1003;
People v. *Perry,* 291 Pac. 237;
United States v. *Gosho Co.,* 23 Fed. (2d) 675;
Sonneborn Bros. v. *Keeling,* 262 U. S. 515;
Foster Fountain Packing Co. v. *Haydel,* 278 U. S. 10;
Carson v. *Vial,* 279 U. S. 164;
United States v. *Erie Ry. Co.,* 280 U. S. 10.

Respectfully,

EDWARD W. SMITH,
WARD ALLEN,
MARCELLUS GREEN,
GARNER W. GREEN,
Counsel for Appellants.

August 9, 1933.

APPENDIX.

SECTION 56, OF CHAPTER 88, MISSISSIPPI LAWS OF 1930.—"COTTON BUYERS. Every person engaged in the business of buying or selling cotton for himself shall pay a privilege tax of one hundred ($100) dollars; but where a cotton buyer only buys cotton from one gin in only one county or buys from the producers in only one municipality, said privilege tax is twenty-five dollars ($25); the license must be issued in his name, and may be paid on or before the first day of September for a full year; only the municipality of his residence can collect a municipal privilege tax of him. Every individual, firm, partnership or corporation engaged in the business of buying or selling cotton shall take out in his or their name a State privilege tax of twenty-five dollars ($25) for every employee engaged in their business as buyer or seller, on or before the first day of September; such privilege tax shall authorize the buying or selling cotton by its bearer; and it shall be unlawful for any employee to buy or sell cotton without a privilege tax in his possession, issued in the name of his employer. Such licenses cannot be issued for less than a year. If the individual, firm, partnership, or corporation take out a municipal privilege in his or their name for the municipality of the residence of their employee and take out also the State privilege tax imposed on them above, such employee shall have the authority to buy or sell cotton in any other municipality of the State, without paying any further State or municipal privilege tax. But the above privilege taxes shall not be required of any landlord or other person who receives cotton in payment of accounts due him, nor of any merchant who pays a privilege tax on a store and who purchases only from the producer at the place of business of such merchant, nor to cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes."

SECTION 62, OF CHAPTER 89, MISSISSIPPI LAWS OF 1932.—"COTTON BUYERS. Upon every person en-

gaged in the business of buying or selling cotton for himself, as follows:

When less than 2,500 bales are handled annually—$25.

When 2,500 bales and less than 5,000 are handled annually—$50.

When 5,000 bales or more are handled annually—$100.

Upon each person buying or selling cotton as an agent for a licensed cotton buyer—$25.

But this section shall not apply to any landlord, merchant, or other person who only receives cotton in payment of accounts due him, or to cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes."

SECTION 2445, MISSISSIPPI CODE OF 1930: "FIRST—LICENSE TAX IS ADDITIONAL.—All cities or towns are hereby authorized to levy and collect license tax upon, and regulate all callings, trades, professions and occupations conducted, pursued, carried on or operated within the limits of said city or town, the same not to exceed fifty per centum of the State license tax levied upon the same callings, trades and professions; provided, however, that whenever the penalty attaches under the State law for failure to take out the privilege tax before beginning business, or failure to pay within the month due, said cities or towns are hereby authorized to collect a penalty equal to the amount of the license in addition thereto."

AN ORDINANCE OF THE CITY OF GREENWOOD, APPROVED FEBRUARY 3, 1930, APPEARING IN MINUTE BOOK 12, AT PAGE 56, OF THE MINUTES OF THE CITY OF GREENWOOD, AND STYLED "AN ORDINANCE LEVYING AN ANNUAL TAX ON PRIVILEGES CONDUCTED WITHIN THE LIMITS OF THE MUNICIPALITY KNOWN AS THE CITY OF GREENWOOD, TO AN AMOUNT EQUAL TO FIFTY PER CENTUM OF THE ANNUAL TAX IM-

POSED ON SUCH PRIVILEGES BY THE STATE OF MISSISSIPPI UNDER CHAPTER 88, OF THE LAWS OF MISSISSIPPI OF 1930, AND PROVIDING PENALTIES."

The ordinance reads as follows:

"Be it ordained by the Council of the City of Greenwood, Leflore County, Mississippi:

"SECTION 1. That there is hereby levied an annual tax on privileges carried on and conducted within the limits of the municipality known as the City of Greenwood by all persons, firms, corporations, businesses, callings and professions described in and mentioned in Chapter 88, of the Laws of Mississippi for 1930, to an amount equal to fifty per centum of the annual tax levied on privileges described in said chapter on each person, firm, corporation, business, calling and profession carried on in municipalities of the third class; provided, however, that no such tax shall be levied on any privileges which under the provisions of said act may be duly licensed for statewide purposes, as therein provided.

"SECTION 2. All municipal licenses shall be obtained from the City Clerk and Tax Collector at the City Hall and every person required to obtain a license for the privilege of engaging in any business included in Section 1 of this ordinance shall make application therefor to the City Clerk and Tax Collector, whose duty it shall be to issue a license to such person.

"SECTION 3. All persons liable for privilege taxes who shall fail to procure the license therefor before beginning the business for which a privilege tax is required by the terms of this ordinance, or who shall fail to renew during the month in which it is due the license on a business for which he has heretofore procured a privilege license, shall in each or either instance, be liable for double the amount of the tax required for such business and it is hereby made the duty of the City Tax Collector whose duty it is to collect the tax on such business, to collect the said tax

penalties, issue a separate license for the tax and for the penalty, and to endorse across the face of the license issued as a penalty the words 'COLLECTED AS DAMAGES,' and the said Tax Collector shall account for all such penalties as required to account for other privilege licenses, provided, however, that the provisions of this ordinance shall not be construed as infringing upon any statutory power of any State officer to collect due and unpaid licenses as now or may be provided for by the laws of the State of Mississippi. In addition to the hereinabove described penalty the delinquent taxpayer shall be guilty of a misdemeanor and may be fined on conviction an amount not exceeding Fifty Dollars ($50).

"SECTION 4. The privilege licenses herein provided shall be and constitute a personal privilege to the person named therein to conduct the business specified in the license and shall not be transferable to any other person. No change in the name of the firm nor the taking in of a new partner nor the withdrawal of one or more of the firm shall be considered as commencing business but if any one or more of the partners remain in the firm the business shall be regarded as continued.

"SECTION 5. It is the intention of this ordinance to levy an annual privilege tax on all privileges mentioned in and described in Chapter 88, of the Laws of Mississippi for 1930, authorized by said act to be levied by municipalities having a population of between ten thousand and fifteen thousand inhabitants, being Class Three, in which the municipality of Greenwood is classed, and no privilege tax shall be imposed and levied by municipalities of the third class according to said act and all exemptions therein mentioned shall be allowed under the terms of this ordinance.

"SECTION 6. That if for any reason any section, paragraph, provision, clause, or part of this ordinance shall be held unconstitutional or invalid that fact shall not affect or destroy any other section, paragraph, provision, clause or part of this ordinance not in and of itself invalid but the

remaining portions hereof shall be in force without regard to that so invalidated; and all ordinances in conflict herewith are hereby repealed.

"SECTION 7. That for the immediate and temporary preservation of the public health, peace and safety and for the reasons of providing regular tax on all privileges conducted in the municipality in accordance with the new State Laws, it is ordered that this ordinance be enforced at and from the date of its passage."

AN ORDINANCE OF THE CITY OF GREENWOOD, MISSISSIPPI, APPROVED JUNE 7, 1932, AND APPEARING IN MINUTE BOOK 13, AT PAGE 597, OF THE MINUTES OF THE CITY OF GREENWOOD:

"Be it ordained by the Council of the City of Greenwood, Leflore County, Mississippi:

"SECTION 1. That there is hereby levied an annual tax on privileges carried on and conducted within the limits of the municipality known as the City of Greenwood by all persons, firms, corporations, businesses, callings and professions described in and mentioned in House Bill #660 of the Laws of Mississippi for 1932, to an amount equal to fifty per centum of the annual tax levied on privileges described in said chapter on each person, firm, corporation, business, calling and profession carried on in municipalities of the third class, provided, however, that no such tax shall be levied on any privilege which under the provisions of said act may be duly licensed for statewide purposes as therein provided.

"SECTION 2. All municipal licenses shall be obtained from the City Clerk and Tax Collector at the City Hall and every person required to obtain a license for the privilege of engaging in any business included in Section 1 of this ordinance shall make application therefor to the City Clerk and Tax Collector, whose duty it shall be to issue a license to such person, and all applicants for a municipal privilege license shall show the number and date of the license that has been issued for state purposes.

"SECTION 3. All persons liable for privilege taxes who shall fail to procure the license therefor before beginning the business for which a privilege tax is required by the terms of this ordinance, or who shall fail to renew during the month in which it is due the license on a business for which he has theretofore procured a privilege license, shall in each or either instance, be liable for double the amount of the tax required for such business and it is hereby made the duty of the City Tax Collector, whose duty it is to collect the said tax penalties, to issue a separate license for the penalty, and to endorse across the face of the license issued as a penalty the words 'COLLECTED AS DAMAGES,' and the said Tax Collector shall account for all such penalties as required to account for other privilege licenses, provided, however, that the provisions of this ordinance shall not be construed as infringing upon any statutory power of any State Officer to collect due and unpaid licenses as now or may be provided for by the laws of the State of Mississippi. In addition to the hereinabove described penalty the delinquent taxpayer shall be guilty of a misdemeanor for violating the provisions of this ordinance and may be fined on conviction an amount not exceeding $50.

"SECTION 4. The privilege licenses provided shall be and constitute a personal privilege to the person named therein to conduct the business specified in the license and shall not be transferable to any other person. No change in the name of the firm nor the taking in of a new partner nor the withdrawal of one or more of the firm shall be considered as commencing business but if any one or more of the partners remain in the firm the business shall be regarded as continued.

"SECTION 5. It is the intention of this ordinance to levy an annual privilege tax on all privileges mentioned in and described in House Bill #660 of the Laws of Mississippi for 1932 authorized by said act to be levied by municipalities having a population of between ten thousand and fifteen thousand inhabitants, being Class Three, in which the municipality of Greenwood is classed, and no privilege

tax shall be imposed or levied not so authorized to be imposed and levied by municipalities of the third class according to said act and all exemptions therein mentioned shall be allowed under the terms of this ordinance.

"SECTION 6. That if for any reason any section, paragraph, provision, clause or part of this ordinance shall be held unconstitutional or invalid that fact shall not affect or destroy any other section, paragraph, provision, clause or part of this ordinance not in and of itself invalid but the remaining portion hereof shall be in force without regard to that so invalidated; and all ordinances or parts thereof in conflict herewith are hereby repealed, especially ordinance entitled 'AN ORDINANCE LEVYING AN ANNUAL TAX ON PRIVILEGES CONDUCTED WITHIN THE LIMITS OF THE MUNICIPALITY, KNOWN AS THE CITY OF GREENWOOD, TO AN AMOUNT EQUAL TO FIFTY PER CENTUM OF THE ANNUAL TAX IMPOSED ON SUCH PRIVILEGES BY THE STATE OF MISSISSIPPI UNDER CHAPTER 88 OF THE LAWS OF MISSISSIPPI FOR 1930, AND PROVIDING PENALTIES' passed June 3, 1930, and recorded in Ordinance Book 3, page 243.

"SECTION 7. That for the immediate and temporary preservation of the public health, peace and safety, and for the reasons of providing regular tax on all privileges conducted in the municipality in accordance with the new State Laws, an emergency is created and it is ordered that this ordinance be enforced at and from the date of its passage."

SECTION 225, OF CHAPTER 88, MISSISSIPPI LAWS OF 1930: "DAMAGES AND PENALTY FOR FAILURE TO PROCURE LICENSE.—All persons liable for privilege taxes who shall fail to procure the license therefor before beginning the business for which a privilege tax is required by law, or who shall fail to renew, during the month in which it is due, the license on a business for which he has theretofore procured a privilege license, shall in each or either such instance be liable for double the

amount of the tax required for such business, and it is hereby made the duty of the collector whose duty it is to collect the tax on such business to collect the said tax and penalty, issue a separate license for the tax, and for the penalty, and to endorse across the face of the license issued as a penalty the words: 'COLLECTED AS DAMAGES,' and they shall account for all such penalties, less commissions, as they are required to account for other privilege taxes. In addition to the hereinabove described penalties the delinquent taxpayer shall be guilty of a misdemeanor and subject to the penalties therefor."

SECTION 2549, MISSISSIPPI CODE OF 1930: "PENAL OFFENSES UNDER GENERAL LAWS.—All offenses under the penal laws of the State which are a misdemeanor shall, when so provided by a general ordinance of the municipality, also be offenses against the city, town or village in whose corporate limits the offense may have been committed to the same effect as though such offenses were made offenses against the city, town or village by separate ordinance in each case, and upon conviction thereof the same punishment shall be imposed by the city, town or village as is provided by the laws of the State with regard to such offenses against the State not in excess of the maximum penalty which may be imposed by municipal corporations."

EDWARD W. SMITH,
WARD ALLEN,
MARCELLUS GREEN,
GARNER W. GREEN,
Counsel for Appellants.

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DEC 6 1933

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 428.

H. CHASSANOIL, APPELLANT,

VS.

CITY OF GREENWOOD, APPELLEE.

BRIEF FOR APPELLANT.

EDWARD W. SMITH,
WARD ALLEN,
SAM C. COOK,
MARCELLUS GREEN,
GARNER W. GREEN,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 428.

H. CHASSANOIL, APPELLANT,

VS.

CITY OF GREENWOOD, APPELLEE.

BRIEF FOR APPELLANT.

This is an appeal from the decision of the Supreme Court of the State of Mississippi in the case of *H. Chassanoil* v. *City of Greenwood,* 148 So. 781.

STATEMENT OF THE CASE.

Appellant, H. Chassanoil, is a cotton buyer and shipper doing business in the City of Greenwood, Leflore County, Mississippi, and is one of the class of cotton buyers and shippers constituting the appellees in the case of *W. L. Matthews et al.* v. *J. F. Rodgers et al.,* being No. 84 of the October Term, 1931, of the Supreme Court of the United States, wherein the right

of the State of Mississippi to levy and exact a privilege tax from the appellees therein was challenged as contravening the Commerce Clause of the Constitution of the United States (Article 1, Section 8, Clause 3).

J. F. Rodgers *et al.* in that cause filed their bill in equity in the District Court of the United States for the Northern District of Mississippi, seeking an injunction against the attempted enforcement of Section 56 of Chapter 88 of the Laws of Mississippi of 1930, on the ground that the business of plaintiffs constituted a part of interstate commerce and the attempted enforcement and collection of the privilege tax constituted an interference with or burden upon interstate and foreign commerce and was, therefore, constitutionally unauthorized.

Pursuant to Sections 238 and 266 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 225, Section 1, a statutory three-judge court was convened and after full hearing perpetually enjoined the officers and agents of the State of Mississippi charged with the enforcement of the statute from undertaking to exact from the plaintiff the privilege tax therein levied or enforce the penalties provided.

On appeal to the Supreme Court of the United States, the final decree of the statutory three-judge court was reversed on the ground that the court was without jurisdiction to hear and determine the cause, the appellees having a full, complete and adequate remedy at law.

W. L. Matthews et al. v. *J. F. Rodgers et al.*, 284 U. S. 521.

Pursuant to Chapter 88 of the Mississippi Laws of 1930 and Chapter 89 of the Mississippi Laws of 1932 (being the Privilege Tax Statutes of the State of Mississippi), the City of Greenwood, Leflore County, Mississippi, by two ordinances adopted June 3, 1930, and June 7, 1932, levied a privilege tax for each year in the amount of $50.00 for the privilege of engaging in the business of cotton buyer to the same extent and in like manner as provided in Chapter 88 of the Laws of 1930 and in Chapter 89 of the Laws of 1932 of the State of Mississippi. On the 1st day of October, 1931, appellant paid the privilege tax under protest and there was issued to him a privilege license to carry on the business of "Cotton Buyer" for a term of one year from September 1, 1931, and on the 1st day of September, 1932, paid a like sum of $50.00 under protest for the privilege of carrying on the business of "Cotton Buyer" for a term of one year from the 1st day of September, 1932.

By virtue of the provisions of Section 2591 of the Mississippi Code of 1930, appellant filed his application for refund of said tax with the City Council of the City of Greenwood, Mississippi, on the ground that he was engaged in interstate and foreign commerce and that the privilege tax levied constituted a direct burden upon interstate commerce contravening Article 1, Section 8, Clause 3 of the Federal Constitution and that the statutes and municipal ordinances levying said privilege taxes were void in so far as applicable to his business.

Inasmuch as the majority opinion of the Supreme Court of the State of Mississippi erroneously indicates

that this cause was tried on an agreed statement of facts, we set forth the proceedings before the City Council of the City of Greenwood and the proceedings chronologically thereafter through the Supreme Court of Mississippi.

The facts and conclusions of fact and law relied upon were set out *in extenso* in the verified application for a refund.

(Record page 6 through 13.)

On the hearing of the application before the City Council of the City of Greenwood, the following evidence was introduced:

(1) The enactment of the ordinances challenged.

(2) Payment under protest by appellant of the tax.

(3) The verified application of appellant.

The facts alleged in this application were admitted in evidence at the hearing before the council by agreement, but there was no agreement that the facts so alleged were true. The record discloses the following:

> "Thereupon, the aforesaid verified application in its entirety, including Exhibits 'A,' 'B,' 'C' and 'D' thereto, was offered and introduced by the said applicant in evidence, and it was agreed by the city council that the facts alleged in said verified application should be admitted as evidence, and the same were so admitted.
>
> "Thereupon, the following order by the board was made and entered:
>
> "By agreement with H. Chassanoil, it is ordered that all facts alleged in the verified application of

said H. Chassanoil for refund of privilege license be admitted as evidence."

(Record pages 20-21.)

This was all of the evidence offered in the case by appellant or by appellee and was the basis of the order of the City Council of the City of Greenwood denying appellant's application.

Pursuant to Section 61 of the Mississippi Code of 1930, an appeal was perfected to the Circuit Court of Leflore County, Mississippi, by bill of exceptions as provided by said section, and the Circuit Court heard the cause as an appellate court and affirmed the order of the City Council of the City of Greenwood.

An appeal from the Circuit Court decision was duly perfected to the Supreme Court of Mississippi, wherein the same questions were presented resulting in an affirmance.

The judgment of the Supreme Court of Mississippi, being the highest court of Mississippi in which this question might be determined, was in favor of the validity of the statutes and ordinances and denied the asserted federal right.

Justice Anderson filed a written dissenting opinion.

H. Chassanoil v. *City of Greenwood*, 148 So. 781 (not yet officially reported).

"The facts of these cases were not agreed to but are not in dispute. Appellee offered no evidence at the conclusion of appellants' but agreed that appellants' petition for the refund of the taxes, and the exhibits thereto, should be admitted in evidence. This was done and constituted all the evidence in the case."

Justice Anderson's dissenting opinion.

Having thus exhausted his remedies at law through the highest court of the State of Mississippi, this appeal is taken under Section 237 of the Judicial Code as amended, being Section 344, Title 28, U. S. C. A., and under Section 861 A, Title 28, U. S. C. A.

The Supreme Court of the State of Mississippi held that the statutes and ordinances challenged by appellant applied solely to intrastate commerce and did not apply to interstate commerce, that appellant was at least partly engaged in intrastate commerce and was liable for the privilege tax and denied that the exaction of the privilege tax from appellant as a condition precedent to engaging in his occupation as cotton buyer was a violation of the Commerce Clause of the Constitution of the United States.

The statutes of the State of Mississippi whose constitutionality is challenged in this cause, are:

1. Section 56 of Chapter 88, Mississippi Laws of 1932. (See page 43 of the appendix hereto, for the full text of this statute.)

2. Section 62 of Chapter 89, Mississippi Laws of 1932. (See page 44 of the appendix hereto, for the full text of this statute.)

3. Section 2445, Mississippi Code of 1930. (See page 44 of the appendix hereto, for the full text of this statute.)

The two ordinances of the City of Greenwood, Mississippi, whose constitutionality is challenged in this cause, are:

1. An ordinance of the City of Greenwood, approved June 3, 1930. (See page 13 of the Record.)

2. An ordinance of the City of Greenwood, approved June 7, 1932. (See page 17 of the Record.)

The payment of the privilege tax assessed by the statutes was made a condition precedent to engaging in the business of a cotton buyer, and a failure to pay the privilege tax subjected the cotton buyer to the penalties set forth in Section 225 of Chapter 88, Mississippi Laws of 1930. (See page 45 of the appendix hereto, for the full text of this statute.)

Section 3 of each of the two ordinances of the City of Greenwood, Mississippi, above referred to, adopts Section 225, Chapter 88, Mississippi Laws of 1930. This action by the City of Greenwood was authorized by Section 2549, Mississippi Code of 1930. (See page 45 of the appendix hereto, for the full text of this statute.)

The verified statement of facts set forth in the application for refund of privilege taxes filed with the City Council of the City of Greenwood, Mississippi, was admitted as evidence and is not in dispute. These facts constitute the basis of the decision of the City of Greenwood, the Circuit Court of Leflore County, Mississippi, and the Supreme Court of the State of Mississippi.

(Record pages 6-21.)

It, therefore, appears from the record that the following uncontroverted evidence constitutes the facts:

ESTABLISHED FACTS.

The Mississippi Delta, an alluvial body of land located within the confines of the State of Mississippi, comprises about 6,650 square miles. It is bounded on the north by the northern boundary of the state and extends along its western boundary in a southerly direction for approximately 190 miles, the western boundary thereof being the Mississippi River. It varies in width from a few yards to approximately 50 miles. The soil of the Mississippi Delta is peculiarly adaptable to the growing of what is commonly known as Delta-type, long staple cotton, which is a peculiar type of cotton, recognized throughout the world in the cotton trade as being of a superior type, character and strength. Yarns spun from this cotton compare favorably with yarns spun from the famous Egyptian and Sea Island long staple cottons.

The City of Greenwood is centrally located in the Mississippi Delta, which is exclusively an agricultural community, its principal crop being this long staple cotton. It produces an average crop of approximately 700,000 bales, which is more than forty percentum of the average annual production of cotton in the State of Mississippi, and is the only product which is raised by the agriculturalists located in the Delta, which is sold on the open market.

All of this cotton, when it ripens in the field, is picked by hand, put through a ginnery, by the process of which the lint is removed from the seed and the lint cotton (in which appellant deals exclusively) is wrapped and tied

into bales weighing approximately 500 pounds each. A bale of cotton when wrapped and tied at the gin is approximately 5 feet in length, 3½ feet wide and 4½ feet in height.

By general and uniform custom, bales of cotton from the gins are transported by rail or otherwise to compresses. A compress is a combination storage warehouse and plant equipped with machinery designed to press bales of cotton under extremely high pressure, for the purpose of reducing the size. A bale, after compression, is approximately 18 inches thick, the purpose of compression being that the railroads and carriers by water, for transportation in interstate and foreign commerce, are able to load into freight cars and steamships approximately three times as much cotton after compression as otherwise would be possible.

At Greenwood, there are three compresses, owned and operated respectively by separate corporations. All of these companies have complied with all of the terms and provisions of an Act of Congress, the short title of which is "The United States Warehouse Act," being Chapter 10, Title 7, U. S. C. A. These companies complied with the terms of the "United States Warehouse Act" for the reason that all of the cotton stored in the compresses and warehouses at Greenwood, Mississippi, and bought by appellant and other cotton buyers, was and is cotton stored and handled therein for shipment to foreign states and countries.

When cotton is delivered to the compresses, actual samples are taken from each bale and classed by per-

sons licensed as classers by the United States Department of Agriculture.

At Greenwood, there exists an active market for the sale and purchase of cotton between the producers and appellant and others engaged in like business, who purchase it with the invariable intention and purpose of selling and transporting the cotton to mills or brokers located in the states upon the Atlantic Seaboard, to-wit: Georgia, South Carolina, North Carolina and Tennessee and the mills of the New England States, to-wit: Massachusetts, Rhode Island and Connecticut, and the mills of foreign countries. None of the cotton is spun or utilized within the State of Mississippi or sold to or purchased by any consumer within the State of Mississippi, nor shipped to any point within the state. This is and has been the universal custom and course of business for more than twenty years.

The price governing the sale of cotton on the Greenwood market is governed by the value of cotton determined by certain cotton exchanges maintained in the Cities of New Orleans, Louisiana, New York City, Chicago, Illinois, and Liverpool, England. There are maintained in the City of Greenwood, Mississippi, offices of brokers, who daily receive by wire, for periods of approximately five hours each day, continuous quotations from these exchanges, which fix and determine the price for which cotton is bought and sold in the Greenwood market.

Approximately 70% of the cotton is transported and delivered to the compresses by rail over the lines of the Yazoo & Mississippi Valley and Columbus & Green-

ville Railroads, both common carriers engaged in interstate commerce. Some growers ship all of their cotton by rail, others transport their cotton to the compresses by truck, automobile or wagon, while others ship a portion by rail and transport the remainder by truck, automobile or wagon. The cotton is thus concentrated in the compresses solely for the purpose of storage and compression to await the determination for its final point of destination to foreign mills and brokers. In the general and uniform course of his business the appellant buys cotton indiscriminately regardless of the means of transportation to the compress from the gin.

When the destination of the cotton is determined, the carriers, after compression, load the cotton on shipping instructions of the then owner charging the through freight rate from the initial point of origin to the ultimate point of destination outside the State of Mississippi, instead of the combination rate for carriage from the initial point of origin to Greenwood, and from Greenwood to the point of ultimate destination outside the State of Mississippi. The charges thus made are pursuant to regulations prescribed by the Interstate Commerce Commission under the Acts of Congress.

Appellant's general and uniform course of business in buying and shipping cotton upon this market is, as follows:

When cotton is delivered to the compress, the grower causes negotiable warehouse receipts to be issued for each bale either directly to himself or his agent, commonly called a cotton factor. These receipts comply with the

terms and provisions of the Act of Congress. Upon the Greenwood market there are a number of such factors and approximately twenty buyers and shippers who are engaged in the sole business of buying, selling and shipping cotton to foreign states and countries. The cotton is sold to the buyers and shippers upon the basis disclosed by the character of samples of the cotton and by the endorsement and delivery of the negotiable cotton receipts evidencing ownership, in accordance with the terms of the Act of Congress. It is uniformly known and understood by the farmer, cotton factor and buyer that the buyer is purchasing the cotton solely for the purpose of causing it to be transported by rail and/or water and delivered to points outside of Mississippi and in other states and foreign countries, where mills convert the cotton into textile products.

The general course and uniform custom among buyers, shippers and sellers, as well as the general course of business, is that a buyer first enters into a contract for either the future or immediate delivery of a certain number of bales of cotton of a certain class, grade and staple, obligating himself by such contract to deliver to a mill in a foreign state or country such cotton at a given price. Thereupon, the buyer will go upon the market at Greenwood and purchase cotton of the kind and character which he is obligated to his customer to deliver, and will cause the delivery of the cotton to the foreign points in accordance with the terms of his contract. A very small proportion of the cotton purchased by shippers and cotton buyers (not exceeding 10%) is

bought when no contract for sale therefor exists. In such cases, it is bought with the sole anticipation and intention on the part of the buyer. (which intention is fully known to the farmer, buyer or factor) to procure a sale of the cotton to foreign cotton mills or foreign cotton merchants and to cause it to be transported in interstate and/or foreign commerce at such time as market conditions will justify. With reference to that proportion (not exceeding 10%) which the buyers purchase when they hold no contract for its sale, these purchases are only a necessary incident to and concomitant part of those purchases which are made for the purpose of filling specific contracts already entered into by the buyers with mills located in states other than in Mississippi and in foreign countries. These incidental purchases called "Overs" arise in cases where the grower insists on offering and selling in one transaction a specified number of bales of cotton of his own selection, and this is the usual and customary manner in which the growers sell their cotton. Without exception, the grades and staples of the lots of cotton offered for sale by the growers, are not uniform as between the various bales of cotton composing such lots. It very frequently happens that a small proportion of a lot of cotton, the purchase of which is contemplated by a buyer, is of a character or grade or staple which the buyer cannot use in filling any existing order which he then holds. The buyer, however, cannot fill his orders without buying these lots of cotton and he must buy these lots in their entirety because the grower will sell no other way. In this way the buyers accumulate and carry on hand small

stocks of cotton not exceeding 10% of the total amount which they handle, but such accumulations are either sold promptly to other buyers on the Greenwood market, who hold orders from mills outside the State of Mississippi for the type of cotton thus incidentally accumulated, or they are shipped by the buyer to foreign states and countries as soon as he can obtain an order therefor in the usual course of his business.

All of appellant's business is conducted in this manner, which is the usual and ordinary and customary course of business in the buying and selling of cotton in the Mississippi Delta.

POINTS RELIED UPON FOR REVERSAL OF THIS CAUSE.

POINT I.

Appellant is solely engaged in interstate commerce and neither the City of Greenwood nor the State of Mississippi is authorized to exact privilege taxes of the appellant as a condition precedent to engage therein, and the attempted exaction contravenes the Commerce Clause of the Constitution of the United States.

POINT II.

The privilege taxes levied, being inseparable and indivisible cannot be exacted from appellant, should it be held that a part of the business of appellant is in intrastate commerce.

POINT III.

The imposition of the privilege taxes, as applied to appellant, constitutes a direct interference with or burden upon interstate and foreign commerce and, therefore, contravenes Article 1, Section 8, Clause 3 of the Constitution of the United States.

BRIEF AND ARGUMENT.

POINT I.

Opinion of Supreme Court of Mississippi.

The majority opinion of the Supreme Court of Mississippi did not discuss the legal principles precisely applicable to the facts shown by the record. That Court held:

A.

Neither the State of Mississippi nor the City of Greenwood is authorized or empowered to levy a privilege tax as a condition precedent to conducting a business of interstate or foreign commerce.

B.

The privilege tax levied by the State of Mississippi and the City of Greenwood was applicable alone to intrastate business.

C.

Appellant was engaged in both intrastate and interstate commerce.

This latter holding misconceives the effect of the course of business of appellant and it is with this holding primarily to which we take exception.

The facts without dispute showed that 30% of the cotton concentrated in compresses in the City of Greenwood was transported thereto by trucks and wagons or

other private conveyances, whereas the balance of the cotton therein concentrated was transported by rail. The Supreme Court of Mississippi apparently conceived the idea that because part of the cotton was transported by conveyance other than rail and because this cotton had not definitely been consigned outside of the State of Mississippi from its point of origin, the purchase and shipment by appellant of this cotton after it had reached the compress constituted an intrastate transaction. Apparently, the Court differentiated between cotton thus transported to the compress and bought and shipped by appellant from cotton transported thereto by rail.

> "In the case before us, as to the 30% that is transported by trucks and wagons or other private conveyances and placed in storage in Greenwood, and not consigned to anyone outside of the State nor sold to anyone outside the State, the property is not in interstate commerce. The owner might withdraw it or sell it whenever he pleases."
>
> Opinion of Supreme Court of Mississippi, 148 So. 785.

> "There is, in fact, much buying and selling of cotton in this State that is in no sense intrastate commerce, and the Legislature knew this to be true."
>
> Opinion of Supreme Court of Mississippi, 148 So. 785.

And again,

> "It is agreed that 30% of the cotton brought into Greenwood and stored there is brought in by trucks, automobiles and wagons, and not placed in interstate commerce at the time it is stored in the warehouses nor, in any sense, consigned to any person for shipment in interstate commerce when sales are made."
>
> Opinion of Supreme Court of Mississippi, 148 So. 784-785.

It has never been contended nor is it now contended by the appellant that the character of the commerce in which he is engaged is in any wise affected by the means used by the grower for the transportation of the cotton from the gins into concentration at the compresses. The facts show that the cotton thus concentrated, after sampling and grading for type, staple and grade, is bought and shipped by appellant in the manner shown by the undisputed facts without regard as to how the cotton was transported to the compress.

It is the contention of the appellant that the Supreme Court of Mississippi cannot declare a transaction an intrastate transaction, which is in fact a transaction in interstate and foreign commerce.

Appellant cannot be thus deprived of his federal right guaranteed to him under the Constitution of the United States.

Moreover the Attorney General of the State of Mississippi in

Matthews v. *Rodgers*, 284 U. S. 521,

agreed that the course of business of appellant and cotton buyers of the class of appellant was as shown by the undisputed evidence in this case, and the attorney general likewise agreed to a statement of facts in all respects in conformity with the facts of this cause in

Federal Compress & Warehouse Co. et al. v. *E. R. McLean, Sheriff, etc.*, being Cause No. 166, October, 1933, Term, Supreme Court of the United States.

The record, therefore, does not bear out the conclusion of the majority opinion of the Supreme Court of Mississippi in this cause that a part of the cotton which is brought into Greenwood is not "in any sense consigned to any person for shipment in interstate commerce when sales are made."

This record and the record in *Matthews* v. *Rodgers, supra,* and the record in *Federal Compress & Warehouse Co.* v. *McLean, supra,* show that all of the cotton brought into the Greenwood compresses, when sales are made, is inevitably consigned for shipment in interstate commerce.

The question of the applicability to the business of appellant of the statutes of the State of Mississippi and the ordinances of the City of Greenwood, herein challenged, is one of original determination by the Supreme Court of the United States, regardless of the declaration of the Supreme Court of the State of Mississippi. The majority opinion of the State Supreme Court confuses this rule with the rule that a State Supreme Court's construction of the scope and purpose of a state statute is binding.

> "In cases brought to this Court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here (citing authorities). Another class

of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question, to analyze the facts'' (citing authorities).

Truax v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254.

The undisputed facts show that all of the cotton raised, produced and concentrated for sale in the Delta of the State of Mississippi is actually bought and shipped out of the State of Mississippi by appellant or others engaged in a similar business; that the cotton is concentrated in warehouses licensed under the United States Warehouse Act, classed and graded by classers licensed by the Secretary of Agriculture and placed upon interstates carriers for immediate shipment to mills located outside the State of Mississippi; that the price paid is governed by cotton exchanges located in the City of New York, the City of Chicago, the City of New Orleans and Liverpool, England. None of the cotton is used or consumed in the State of Mississippi and the sole and entire business of appellant and the entire course of his business is to purchase for shipment and the actual shipment of this cotton in interstate and foreign commerce and to be delivered and applied on existing contracts for the shipment thereof to foreign mills and brokers.

The grower transports the cotton from the gin to the compress for concentration and sale to appellant and others in like business, with the intention and knowledge that the cotton will be so purchased, sold and ultimately delivered to points wholly without the State of Mississippi. This is true whether the cotton is transported to

the compresses by rail, wagon or other common carrier or private conveyance.

The privilege tax levied on appellant as a condition precedent to the purchase by appellant of the cotton is a tax upon an essential agency without which the cotton would never move along the channels of interstate and foreign commerce. The act of purchasing and delivering to a carrier after compression for shipment is an indispensable part of the continued transportation of the commodity to the ultimate consumer located in a foreign state or country.

> "Buying for shipment and shipping to markets in other states, when conducted as above shown, constitutes interstate commerce—the buying being as much a part of it as the shipping."
>
> *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189.

The primary and essential fact to be determined is whether or not the course of business in which appellant engages is interstate or foreign commerce. If appellant's business is that of interstate or foreign commerce, then the extent of conditioning its exercise or interference with or burden placed upon his business is immaterial.

Cudahy Packing Co. v. *Hinkel*, 278 U. S. 460.

In determining whether or not appellant is engaged in interstate and foreign commerce, we cannot differentiate the facts in this case from the facts in the following cases, decided by this Court.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282;

Wm. Lemke v. *Farmers Grain Co.*, 258 U. S. 50;

Shafer v. *Farmers Grain Co.*, 268 U. S. 189.

The facts of the *Lemke Case, supra,* and *Shafer Case, supra,* and the conclusions reached by the court are so clearly in conformity with the contention of appellees in this case, we take the liberty of quoting *in extenso* from the opinions in those causes.

The facts and conclusions of the court in the Lemke case, through Mr. Justice Day, so far as pertinent to the case at bar, are as follows:

> "The record discloses that North Dakota is a great grain-growing state, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota, to be shipped to and sold at terminal markets in other states, the principal markets being at Minneapolis and Duluth. There is practically no market in North Dakota for the grain purchased by complainant. The Minneapolis prices are received at the elevators of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his 'spread' or margin of profit. The purchases are generally made with the intention of shipping the grain to Minneapolis. The grain is placed in the elevator for shipment, and loaded at once upon cars for shipment to Minneapolis and elsewhere outside the State of North Dakota. The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain—Minneapolis, Duluth or elsewhere. This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. The market for grain bought at Emden is outside the State of North Dakota, and it is an unusual thing to get an offer from a point within the state. After

the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under federal law.

"That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts and altogether so in principle. *Dahnke-Walker Mill Co.* v. *Bondurant*, decided December 12, 1921 (257 U. S. 282, *ante*, 239, 42 Sup. Ct. Rep. 106). In that case the facts disclose that a company organized in Tennessee, and carrying on business there, went into Kentucky, and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The state court held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee company amenable to the regulatory statutes of the state. This court rejected the conclusion of the state court, and held that the buying, no less than the selling of grain, under such circumstances, was a part of interstate commerce, committed to a national control by the Federal Constitution. Applying the principle of that decision, and the previous decisions of this court, cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances herein disclosed, was interstate commerce. Being such, the state could not regulate the business by a statute which had the effect to control and burden interstate commerce.

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and federal authority under facts presented, which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In

those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey, by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. It is true, that appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all of the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transaction * * * (citing authorities) * * *.

"Thus, the states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it * * *. (Citing authorities.)"

"Applying the principle here, the statute denies the privilege of engaging in interstate commerce, except to dealers licensed by state authorities, and provides a system, which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce."

After the decision in the above case, the State of North Dakota undertook once again to regulate the purchase of grain within North Dakota. This act was challenged and in the *Shafer Case, supra,* in delivering the opinion of the court, Mr. Justice Van DeVanter stated:

"Wheat is the chief product of the farms of North Dakota, the annual crop approximating 150,000,000 bushels. About 10 per cent is used and consumed locally, and about 90 per cent is sold within the state to buyers who purchase for shipment, and ship to terminal markets outside the state. Most of the sales are made at country elevators to which the farmers haul the grain when harvested and threshed. These elevators are maintained and operated by the buyers as facilities for receiving the grain from farmers' wagons and loading it into railroad cars. The loading usually proceeds as rapidly as grain of any grade is accumulated in carload lots and cars can be obtained. When a car is loaded, it is sent promptly to a terminal market and the grain is there sold. This is the usual and recognized course of buying and shipment. Occasionally a farmer has his grain stored in the country elevator, or shipped to a terminal elevator for storage, *and awaits a possible increase in price;* but even in such instances he usually sells to the buyer operating the country elevator, and the latter then sends the grain to the terminal market, if it has not already gone there.

"The price paid at the country elevators rises and falls with the price at the terminal markets, but is sufficiently below the latter to enable the country buyer to pay for the intermediate transportation and have a margin of profit. All transactions at the terminal markets, including the price, are based on the grade of the wheat, and by reason of this all buying at the country elevators is by grade.

"The grading at the terminal markets is done by inspectors licensed under the United States Grain Standards Act, who are required to apply to all interstate shipments the grading standards promulgated under that act by the Secretary of Agriculture. There are no inspectors licensed under that act at the country elevators; and so the grading is done there unofficially by the buyers or their agents as an incident and part of the buying.

"Grading includes an ascertainment of the proportions of clean wheat and of dockage in each lot of grain, and an ascertainment of the quality of the wheat. Dockage consists of separable foreign material, such as dirt, pieces of straw, chaff, weed stems, weed seeds, and grain other than wheat. Its proportion varies in different lots, but generally is less than 5 per cent. When not separated it causes the grain to bring a lower price per bushel than clean wheat would bring. When separated it has a value for poultry and stock feed which usually is in excess of the cost of separation. Occasionally the farmer separates it at the farm and sells only the clean wheat, and occasionally the buyer separates it at the country elevator, charges the farmer for that service, and buys and ships only the clean wheat; but generally the grain is sold by the farmer and shipped by the country buyer with the dockage included. The influence of dockage on the value of the grain and the current modes of handling it are shown in publications of the Agricultural Department of the United States, pertinent excerpts from which are set out in the margin.

"As many as 2,200 country elevators are operated within the state in the business here described—generally two or more by competing buyers at each station. Some of the buyers are individuals and others are corporations. A large number of farmers' cooperative companies, which buy grain grown by their stockholders and others in the vicinity of their elevators, ship and sell the same, and distribute as patronage dividends the surplus arising from such transactions—no profit being retained by the companies.

"The plaintiffs compromise, many buyers, individual and corporate, including eleven farmers' cooperative companies. In the aggregate they own and operate several hundred country elevators, widely distributed over the state, and buy and ship about 30,000,000 bushels of wheat per year. They carry

on the business severally, each buying and shipping independently of the others. All buy with the purpose of shipping to and selling in terminal markets outside the state, and carry out this purpose in the manner already described."

The Court, after setting out the above facts, stated:

"Buying for shipment and shipping to markets in other states, when conducted as above shown, constitutes interstate commerce—the buying being as much a part of it as the shipping. We so held in *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, 42 Sup. Ct. Rep. 244; following and applying the principle of prior cases. Later cases have given effect to the same principle. *Stafford* v. *Wallace*, 258 U. S. 495, 516, 66 L. Ed. 735, 741, 23 A. L. R. 229, 42 Sup. Rep. 397; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309, 68 L. Ed. 308, 316, 44 Sup. Ct. Rep. 96. Wheat—both with and without dockage—is a legitimate article of commerce and a subject of dealings that are nation wide. The right to buy it for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution."

The Court likewise stated:

"We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause."

In the case at bar, it is undisputed that *all* of the cotton purchased by appellant is actually shipped to points without the State of Mississippi and, therefore, it would be impossible to entertain any intention other than that this course would be followed and was so intended at the time of the purchase. Even though certain "Overs" should have been disposed of locally by appellant to other cotton buyers, the latter bales of cotton likewise were intended ultimately to be shipped to foreign states and countries, and furthermore they were only bought as a necessary incident to the purchase of cotton which had already been sold without the state.

The *Dahnke-Walker Milling Co. Case, supra,* approved in the *Lemke Case, supra,* states the rule as follows:

> "Such commerce (commerce among the several states) is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another state for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they have reached their destination, and while they are in the original packages * * * (citing authorities) * * *. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation * * *." "Buying and selling and the transportation incidental thereto constitute commerce." * * * "Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states and includes not only the transportation of persons and property and the navigation of public

waters for that purpose, but also the purchase, sale and exchange of commodities. In no case has the Court *made any distinction* between buying and selling or between buying for transportation to another state and transporting for sale in another state."

The holdings in the above-entitled causes completely answer the majority opinion of the Supreme Court of Mississippi in this cause. A difference of no consequence between the facts in the *Shafer* and *Lemke Cases, supra,* and the facts of the case at bar is that the buyers in those cases owned the elevators in which the grain was concentrated, whereas in the instant case, the warehouses and compresses are separately owned institutions operating under the United States Warehouse Act.

If the cotton thus concentrated in the compresses and warehouses was not a subject matter of interstate and foreign commerce, regulation thereof under the provisions of the Act of Congress would not be permitted.

In the *Lemke* and *Shafer Cases, supra,* it was conceded that 10% of the wheat concentrated in the elevators in North Dakota was used and consumed in the State of North Dakota and 90% thereof bought by the buyers and shipped out of the State of North Dakota. In the instant case, it is shown that all of the cotton concentrated in the compresses and warehouses in the Delta of Mississippi is bought, sold and shipped out of the State of Mississippi and that no part thereof is used or consumed in the state. It is shown that the grower, as well as the buyer and factor, knows and it is the intention of each that the cotton transported from the gin to the compresses is to be sold to the buyers and for-

warded from the compresses by rail or water to mills in foreign states and countries.

Under these facts, the exaction of privilege tax by the State of Mississippi or the City of Greenwood conditioning the exercise of the right of appellant to engage in his occupation as a buyer and shipper of cotton directly interferes with and places a burden upon interstate commerce.

Sprout v. *City of South Bend*, 277 U. S. 163;
Eureka Pipe Line, etc., v. *Walter S. Hallanan*, 257 U. S. 265;
United Fuel Gas Company v. *Hallanan*, 257 U. S. 277;
Burton et al. v. *Clyne, etc.*, 258 U. S. 495;
State Tax Commission v. *Interstate Natural Gas Co.*, 284 U. S. 41.
Compare: *Somebarn* v. *Keeling*, 262 U. S. 506.

"It has long been settled that a state cannot lay a tax on interstate commerce in any form • • • whether on the transportation of subject of commerce, the receipts derived therefrom, or the occupation or business of carrying it on."
Ozark Pipe Line Corp. v. *Monier*, 266 U. S. 555.

That the purchase of cotton within Mississippi for sale and transportation without Mississippi is not a local transaction, which may be conditioned by the state by the levy of a tax, is settled in:

Dahnke-Walker Milling Co. v. *Bondurant, supra;*

and this is true even though the transaction of purchase and sale is completed in the State of Mississippi.

Federal Trade Commission v. *Pacific States Paper Trade Ass'n*, 273 U. S. 52;
Foster Fountain Packing Co. v. *Haydel*, 278 U. S. 1.

The fact that the cotton is temporarily concentrated by the growers in a compress, thereafter to be sold and shipped, does not interrupt the interstate character of the commerce.

> "The film contracts were between residents of different states, and contemplated the leasing by one to the other of a commodity manufactured in one state and transported and to be transported to and used in another. The business of the distributors, of which the arrangement with the exhibitor here was an instance, was clearly interstate. It consisted of manufacturing the commodity in one state, finding customers for it in other states, making contracts of lease with them, and transporting the commodity leased from the state of manufacture into the states of the lessees. If the commodity were consigned directly to the lessees, the interstate character of the commerce throughout would not be disputed. Does the circumstances that, in the course of the process, the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in the same state, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end, and was not intended to end, the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an interstate character, 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end'" (citing authorities).

See:

Binderup v. *Pathe Exchange*, 263 U. S. 291;
Carson Petroleum Co. v. *Vial*, 279 U. S. 95;
Coe v. *Errol*, 116 U. S. 517;

Champlain Realty Co. v. *Battleboro*, 260 U. S. 366;

Hughes Bros. Timber Co. v. *Minnesota*, 272 U. S. 469;

Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498;

Texas & N. O. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111;

Swift & Co. v. *United States*, 196 U. S. 375.

See, also:

Stafford v. *Wallace*, 258 U. S. 495.

cited with approval in *Binderup* v. *Pathe Exchange*, *supra*, wherein the Supreme Court stated:

> "Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. The Commission men are essential in making the sale, without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity."

As to the character of the commerce of cotton moving into the compress and warehouse and out to ultimate destination compare:

McFadden et al. v. *Alabama G. S. R. Co.*, 241 Fed. 562.

See, also:

United States of America v. *Erie R. Co.*, 280 U. S. 98;

Carson Petroleum Co. v. *Vial*, 279 U. S. 95.

Therefore,

> "It is elementary that a state may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."
>
> *New Jersey Bell Telephone Co.* v. *State Board of Taxes and Assessment of State of New Jersey*, 280 U. S. 338.

Federal Control.

The majority of the Supreme Court of Mississippi apparently was of opinion that there was no difference between the state's right to levy a property tax on property, a part of the mass of property of the state, and a tax conditioning the right to engage in interstate commerce. The majority opinion likewise misconceived the difference between property which had ended its journey and property which was in the course of interstate commerce and temporarily interrupted in order to further interstate commerce by the sale thereof.

Although it is not material for a correct solution and decision of this case whether the cotton stored in the compresses remained a part of the mass of the property of the state subject to a property tax or was property in the course of interstate commerce and not subject to a property tax by the State of Mississippi, yet it is submitted that cotton stored for sale, compression and shipment, as reflected by the record in this case is in the

channels of interstate commerce and not subject to a property tax by the state.

The delivery of cotton by farmers to local compresses in Mississippi to be shipped to foreign states and countries, when all of the cotton purchased by cotton buyers from samples taken from the cotton in the compresses is so shipped and the price fixed by that on the New Orleans, Chicago, New York and Liverpool, England, Cotton Exchanges, constitutes a course of business and determines the interstate character of the transaction. When it further appears that the farmer knew and originally intended that the cotton concentrated in the compresses would be purchased by cotton buyers and placed aboard cars and shipped to foreign states and countries and this intention fully carried out with respect to *all* cotton originating from the gins and concentrated in the compress, the compresses

> "are but a throat through which the current flows and the transactions which occur therein are only incidents to this current from the West to the East (*South to the East and abroad*) and from one State to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers (*direct to Cotton Buyers or by sale among themselves*)" (italics our words).
>
> *Stafford* v. *Wallace, supra.*

The controlling principles applicable are stated in:

> *State of Minnesota* v. *George Blasius,* Cause No. 7, October, 1933, Term, United States Supreme Court, decided November 6, 1933, 78 Law. Ed. 19.

All of the cotton thus stored being the subject matter and actually in the channels of interstate commerce, the Congress of the United States has undertaken the regulation thereof in the "United States Warehouse Act," being Chapter 10, Title 7, U. S. C. A., requiring all cotton thus concentrated to be classed and graded in conformity with standards prescribed by the Secretary of Agriculture by cotton classers licensed by the Department of Agriculture of the United States; prescribes the form of negotiable warehouse receipt therefor, and the manner of delivery of cotton evidenced thereby; the Interstate Commerce Commission fixes the intermediate rate from point of origin into the compress to point of ultimate destination, rather than the combination rate.

It, therefore, appears that federal authority has preempted jurisdiction over the handling, purchase, sale and shipment of this cotton at the time it temporarily comes to rest in the compresses. It follows that appellant, in the purchase and shipment of this cotton, is dealing in property actually in the channels of interstate commerce at the time of purchase.

Compare

Jones v. *Hiawatha Gin & Mfg. Co.*, 17 Fed. (2d) 193.

in which District Judge Holmes (Miss.) took judicial knowledge

> "that nearly all cotton produced in this State (Mississippi) finds its way into interstate commerce,"

and entertained jurisdiction of a suit for damages for cotton destroyed in a cotton warehouse licensed under the

United States Warehouse Act as a cause arising under the laws of the United States.

Overs.

It is contended by appellee that the purchase by appellant and like buyers and shippers of cotton, not exceeding 10% of the purchases made, and the resale thereof to other cotton buyers and shippers in Greenwood, constitute transactions in intrastate commerce and the privilege tax complained of being applicable only to intrastate transactions, as held by the Supreme Court of Mississippi, the exaction thereof against appellant and cotton buyers and shippers similarly situated is a valid exercise of state power.

It is apparent that this argument is without foundation in fact. It appears that all local disposition of cotton by these cotton buyers is that which they are compelled to purchase in order to acquire other cotton to apply on contracts, which they have with mills in foreign states and countries, and is acquired as a necessary incident thereof for the reason that the grower sells only cotton of his own selection. It also appears that this cotton, or "Overs," after transfer likewise is applied by the transferee cotton buyer on contracts which the transferee cotton buyer has with mills in foreign states and countries.

This latter condition alone is sufficient to bring the facts of this case within the rule of the *Lemke* and *Shafer Cases, supra.* The inseparable feature of these "Overs," however, is that which differentiates the case at bar from *Pullman Co.* v. *Adams,* 78 Miss. 829;

Osborn v. *Florida*, 164 U. S. 650;
N. O. M. & C. R. R. Co. v. *State*, 110 Miss. 290, (cited in the majority opinion of the Supreme Court of Mississippi).

This is plainly pointed out in the closing paragraph in the dissenting opinion of Mr. Justice Anderson.

It is apparent that the purchase and sale of these "Overs" is a necessary and indispensable incident to the purchase of any cotton by appellant and is, therefore, an incident of his business without which appellant will be unable to carry on any part of his business.

These transactions

> "Create a local change of title, it is true, but they do not stop the flow, they merely change the private interests in the subject of the current, not interfering with, but on the contrary being indispensable to its continuity."
>
> *Stafford* v. *Wallace*, 258 U. S. 495.

To the same effect,

Binderup v. *Pathe Exchange, supra;*
United States of America v. *Erie R. Co., supra.*

Can it be said that because appellant and other buyers similarly situated, in order to pursue their course of business, are unwillingly compelled to acquire certain cotton for which they have no sale and dispose of the cotton thus acquired to other cotton buyers, who in turn apply it on foreign contracts which they have, are engaged in intrastate commerce?

We submit there is no basis in fact for such a theory.

It is, therefore, submitted that under the undisputed facts, appellant is solely engaged in interstate and for-

eign commerce. The exercise of his occupation cannot be conditioned by the State of Mississippi by the imposition of a tax for the privilege of exercising it consistent with the Commerce Clause of the United States Constitution.

POINT II.

The Supreme Court of Mississippi has held that the privilege taxes complained of are solely applicable to intrastate business; that appellant is partly engaged in intrastate commerce and interstate commerce, and, therefore, the statutes and ordinances are not repugnant to the Commerce Clause of the Constitution of the United States.

We have demonstrated that the appellant is solely engaged in interstate commerce. Should, however, it be conceded that appellant's business contemplates both interstate and intrastate commerce, yet the tax as applicable to appellant is violative of the Commerce Clause of the Constitution in that:

(1) The tax is indivisible and inseparable.

(2) Appellant could not discontinue the alleged intrastate business without withdrawing also from the interstate business.

We concede that this Court is bound by the holding of the Mississippi Supreme Court to the effect that the Legislature of Mississippi, in the enactment of the statutes complained of, and the City of Greenwood, in the enactment of the ordinances complained of, intended that they should apply only to intrastate commerce. We, how-

ever, submit that, where the business is inseparable and indivisible and so-called intrastate commerce is a concomitant and inextricable part of the interstate business and where one cannot be carried on without the other, the tax is unenforcible.

"But, in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition, *and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business*" (citing authorities) (italics ours).

Otis Sprout v. *City of South Bend*, 277 U. S. 163.

"The act, in its second section, requires every distributor of gasoline to pay an annual license tax of $50.00 for each distributing station or place of business or agency, requires it to be paid in advance, and renders it unlawful to carry on the business without having paid it. Section 8 declares that any persons who shall engage or continue in the business of selling gasoline without a license shall be deemed guilty of a misdemeanor, and, upon conviction, be punished by fine or imprisonment, or both. The subject taxed is not in its nature divisible, as in the case of the excise tax. The imposition falls upon the entire business indiscriminately; and so does the prohibition against the further conduct of business without making the payment. By accepted canons of construction, the provisions of the act in respect of this tax are not capable of separation so as to confine them to domestic trade, leaving interstate commerce exempt (citing authorities).

No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the state—that is to say, without authority of law. Hence, it cannot be enforced at all."

Bowman v. *Continental Oil Co.*, 256 U. S. 642.

It is significant that in the *Bowman Case, supra,* it appears that the business conducted by the Continental Oil Company was 94.5 intrastate and 5.5 interstate.

In the case at bar, the maximum sales made from one cotton buyer to another on the Greenwood market constitute not in excess of 10% of the cotton purchased by the buyer.

The Supreme Court of the State of Mississippi having held in effect that appellant was engaged in interstate commerce and intrastate commerce and it appearing that the business so thus conducted is inseparable and that the intrastate business could not be abandoned without likewise abandoning the interstate commerce, the *Bowman Case, supra,* and the *Sprout Case, supra,* are controlling.

POINT III.

The privilege taxes sought to be imposed against appellant forbid appellant from engaging in his business unless the tax first be paid; on failure to pay the tax penalties and damages are imposed and appellant is subject to criminal prosecution.

Under the authority of the *Lemke, Shafer* and *Dahnke-Walker Milling Company Cases, supra,* as well as numerous other decisions of this Court, appellant is engaged in interstate and foreign commerce. His business is an indispensable part of the sale, transportation and distribution of cotton in interstate and foreign commerce concentrated in the compresses at Greenwood, Mississippi, for sale, distribution and transportation to the markets. It is shown that the only markets are markets foreign to the State of Mississippi. It is shown that no part of this cotton is used or consumed in the State of Mississippi. It is shown that as an incident of the purchase of this cotton by appellant and other cotton buyers and shippers, it is necessary among themselves to dispose of not exceeding 10% of the purchases thus made. It is shown that this "Overs" cotton is placed on contracts, which would fit that type, kind and grade of cotton, and continues into the general flow of transportation to other states and foreign countries. It is shown that it is the universal intention of the grower, factor (commission man) and cotton buyer and shipper, that all of the cotton moving from the gins into the compresses shall thereafter be moved by rail or water from the compresses to foreign states and countries, and all of the cotton actually so continues into this channel of commerce.

It is, therefore, submitted that the course of business in which appellant is engaged is indispensable to the continued flow of this cotton to the foreign markets and constitutes interstate and foreign commerce, through the channels of which all of the cotton, stored and sold under the circumstances reflected by the undisputed facts, finds its way.

We commend the dissenting opinion of Mr. Justice Anderson to this court as not only being sound in application of the legal principles involved, but for its clarity in applying these principles to the undisputed facts appearing in the record.

The imposition, therefore, by the State of Mississippi and the City of Greenwood of a tax upon appellant conditioning the privilege of engaging in his occupation as cotton buyer is repugnant to the Commerce Clause of the Constitution of the United States and may not be exacted from him, under the authorities above cited.

Respectfully submitted,

EDWARD W. SMITH,
WARD, ALLEN,
SAM C. COOK,
MARCELLUS GREEN,
GARNER W. GREEN,
Counsel for Appellant.

Certificate.

This is to certify that we have this day delivered to Honorable Greek L. Rice, Attorney General of the State of Mississippi, and to Honorable A. H. Bell, Attorney for the City of Greenwood, Mississippi, a true copy of the above and foregoing brief.

This the 16th day of November, A. D. 1933.

EDWARD W. SMITH,
Of Counsel for Appellant.

APPENDIX.

SECTION 56 OF CHAPTER 88, MISSISSIPPI LAWS OF 1930. —"COTTON BUYERS. Every person engaged in the business of buying or selling cotton for himself shall pay a privilege tax of one hundred ($100) dollars; but, where a cotton buyer only buys cotton from one gin in only one county or buys from the producers in only one municipality, said privilege tax is twenty-five dollars ($25); the license must be issued in his name and may be paid on or before the first day of September for a full year; only the municipality of his residence can collect a municipal privilege tax of him. Every individual, firm, partnership or corporation engaged in the business of buying or selling cotton shall take out in his or their name a state privilege tax of twenty-five dollars ($25) for every employee engaged in their business as buyer or seller, on or before the first day of September; such privilege tax shall authorize the buying or selling cotton by its bearer; and it shall be unlawful for any employee to buy or sell cotton without a privilege tax in his possession, issued in the name of his employer. Such licenses cannot be issued for less than a year. If the individual, firm, partnership or corporation take out a municipal privilege in his or their name for the municipality of the residence of their employee and take out also the state privilege tax imposed on them above, such employee shall have the authority to buy or sell cotton in any other municipality of the state, without paying any further state or munici-

pal privilege tax. But the above privilege taxes shall not be required of any landlord or other person who receives cotton in payment of accounts due him, nor of any merchant who pays a privilege tax on a store and who purchases only from the producer at the place of business of such merchant, nor to cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes."

SECTION 62 OF CHAPTER 89, MISSISSIPPI LAWS OF 1932. —"COTTON BUYERS. Upon every person engaged in the business of buying or selling cotton for himself, as follows:

When less than 2,500 bales are handled annually —$25.

When 2,500 bales and less than 5,000 are handled annually—$50.

When 5,000 bales or more are handled annually —$100.

Upon each person buying or selling cotton as an agent for a licensed cotton buyer—$25.

But this section shall not apply to any landlord, merchant, or other person who only receives cotton in payment of accounts due him, or to cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes."

SECTION 2445, MISSISSIPPI CODE OF 1930: "FIRST—LICENSE TAX IS ADDITIONAL.—All cities or towns are hereby authorized to levy and collect license tax upon, and regulate all callings, trades, professions and occupations conducted, pursued, carried on or operated within the limits of said city or town, the same not to exceed fifty

per centum of the state license tax levied upon the same callings, trades and professions; provided, however, that whenever the penalty attaches under the state law for failure to take out the privilege tax before beginning business, or failure to pay within the month due, said cities or towns are hereby authorized to collect a penalty equal to the amount of the license in addition thereto."

SECTION 255 OF CHAPTER 88, MISSISSIPPI LAWS OF 1930: "DAMAGES AND PENALTY FOR FAILURE TO PROCURE LICENSE.—All persons liable for privilege taxes who shall fail to procure the license therefor before beginning the business for which a privilege tax is required by law, or who shall fail to renew, during the month in which it is due, the license on a business for which he has theretofore procured a privilege license, shall in each or either such instance be liable for double the amount of the tax required for such business, and it is hereby made the duty of the collector whose duty it is to collect the tax on such business to collect the said tax and penalty, issue a separate license for the tax, and for the penalty, and to endorse across the face of the license issued as a penalty the words: 'COLLECTED AS DAMAGES,' and they shall account for all such penalties, less commissions, as they are required to account for other privilege taxes. In addition to the hereinabove described penalties the delinquent taxpayer shall be guilty of a misdemeanor and subject to the penalties therefor."

SECTION 2549, MISSISSIPPI CODE OF 1930: "PENAL OFFENSES UNDER GENERAL LAWS.—All offenses under the

penal laws of the state which are a misdemeanor shall, when so provided by a general ordinance of the municipality, also be offenses against the city, town or village in whose corporate limits the offense may have been committed to the same effect as though such offenses were made offenses against the city, town or village by separate ordinance in each case, and upon conviction thereof the same punishment shall be imposed by the city, town or village as is provided by the laws of the state with regard to such offenses against the state not in excess of the maximum penalty which may be imposed by municipal corporations."

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V.

POINTS TO BE RELIED UPON

The argument for the appellee will be made under the following points, to-wit:

POINT I.

The privilege license in this case is not a burden on interstate commerce.

POINT II.

In construing statutes in reference to interstate commerce the courts make a well defined distinction between statutes levying a tax and statutes regulating commerce.

POINT III.

A privilege tax levied upon a cotton buyer must be treated as in effect a tax upon the cotton purchased in determining questions arising under the Federal Constitution in reference to the power of the State to tax; that is to say, if the State could levy an ad valorem tax upon the cotton, then it could levy a privilege tax upon the person engaged in the business of buying such cotton.

POINT IV.

An ad valorem tax may be levied upon the cotton at any time before the cotton enters the channels of interstate commerce and a privilege tax may be levied upon the person engaged in the business of buying such cotton at any time before it enters the channels of such commerce.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 428.

H. CHASSANIOL,

Appellant,

VS.

CITY OF GREENWOOD,

Appellee

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Briefly stated the facts shown by the record in this case are as follows:

Long staple coton is produced in what is known as the Mississippi Delta. The grower of this cotton after having it ginned, transports it to the compresses in the City of Greenwood by wagons, automobiles, trucks, and railroads. There the cotton is concentrated in one of the three compresses located in the City of Greenwood. The amount of cotton received at the compresses by railroad is about seventy-five per cent, and that received by automobiles, trucks, or wagons is about twenty-five per cent.

The concentration of this cotton in the compresses at Greenwood is primarily for the following reasons:

First, in order that it may be marketed at the best advantage.

Second, in order that the title to the cotton may be passed by the exchange of compress warehouse receipts.

Third, in order that it may be safely stored until finally shipped to its ultimate destination.

Fourth, in order that it may be compressed as a preparation for shipment.

The appellant, H. Chassaniol, is a cotton buyer in the City of Greenwood. He first enters into a contract for the FUTURE or IMMEDIATE delivery of a certain number of bales of cotton of a certain class, grade, and staple obligating himself by such contract to deliver to a mill in a foreign state or country such cotton at a given price. He then goes upon a market at Greenwood and purchases cotton of the kind and character which he is obligated to his customer to deliver and will deliver the cotton in accordance with the terms of his contract.

He also buys cotton for which he has no contract but which he INTENDS to sell to purchasers in another state or foreign country. He also buys a small amount of cotton which he sells on the local market to other buyers in Greenwood or which he MAY sell if he receives an order for the kind of cotton so bought and held by him.

There is an active market for the buying and selling of cotton in the City of Greenwood and the cotton so stored

in the compresses is placed there for an indefinite time and may be bought and sold a number of times before being actually shipped to its final destination.

The cotton so stored in the compresses in Greenwood becomes the property of the owner and holder of the warehouse receipt issued against such particular cotton and its owner may deal with it in any manner he desires. From this record it shows that the appellant after becoming the purchaser of any particular cotton may deal therewith as follows:

First, he may ship it to another state or foreign country immediately.

Second, he may hold it for an indefinite time UNDER HIS INTENTION to ship it to another state or foreign country.

Third, he may sell it to another buyer on the local market in Greenwood.

The record shows that the appellant did all three of these transactions.

For engaging in business of this kind, the appellant paid the City of Greenwood, the appellee, for privilege license fixed by the Ordinances shown by the record.

Record pages 13 and 17.

The appellant sought a refund of the privilege license paid to the City of Greenwood during the years 1931 and

1932 of Fifty Dollars ($50.00) each year. The Council of the City of Greenwood by its order denying this refund to the appellant determined the question of fact against the appellant. On Appeal to the Circuit Court of Leflore county, Mississippi, this finding of the Council of the City of Greenwood on the statements shown by the appellant's application was sustained, and the cause affirmed. The appellant then appealed to the Supreme Court of the State of Mississippi, and that Court affirmed the judgment of the Circuit Court of Leflore County, Mississippi.

H. Chassanoil v. City of Greenwood, 148 So. 781. (Not yet officially reported).

The appellant now brings this case to the Supreme Court of the United States by Appeal from the Supreme Court of the State of Mississippi.

BRIEF AND ARGUMENT

POINT I.

THE PRIVILEGE LICENSE IN THIS CASE IS NOT A BURDEN ON INTERSTATE COMMERCE.

The ordinance of the City of Greenwood adopted June 3, 1930, and shown on page 13 of the record was enacted under the authority of Chapter 88 of the Laws of Mississippi for 1930, and the Section thereof that statute is as follows:

> "Every person engaged in the business of buying or selling cotton for himself shall pay a privilege tax of one hundred ($100) dollars; but,

where a cotton buyer only buys cotton from one gin in only one county or buys from the producers in only one municipality, said privilege tax is twenty-five ($25) dollars; the license must be issued in his name, and may be paid on or before the first day of September for a full year; only the municipality of his residence can collect a municipal privilege tax of him. Every individual, firm, partnership or corporation engaged in the business of buying or selling cotton shall take out in his or their name a state privilege tax of twenty-five ($25) dollars for every employee engaged in their business as buyer or seller, on or before the first day of September; such privilege tax shall authorize the buying or selling cotton by its bearer; and it shall be unlawful for any employee to buy or sell cotton without a privilege tax in his possession, issued in the name of his employer. Such license cannot be issued for less than a year.

"If the individual, firm, partnership, or corporation take out a municipal privilege in his or their name for the municipality of the residence of their employee and take out also, the state privilege tax imposed on them above, such employee shall have the authority to buy or sell cotton in any other municipality of the state, without paying any further state or municipal privilege tax.

"But the above privilege taxes shall not be required of any landlord or other person who receives cotton in payment of accounts due him, nor of any merchant who pays a privilege tax on a store and who purchases only from the producer at the place of business of such merchant, nor to

cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes."

The ordinance complained of that was adopted June 7, 1932, was authorized by Chapter 89 of the Laws of Mississippi, for 1932 and under Section 62 thereof which is as follows:

"Upon every person engaged in the business of buying or selling cotton for himself, as follows:

When less than 2,500 bales are handled annually ..... $ 25.00

When 2,500 bales and less than 5,000 are handled annually ..... $ 50.00

When 5,000 bales or more are handled annually $100.00

Upon each person buying or selling cotton as an agent for a licensed cotton buyer $ 25.00

But this section shall not apply to any landlord, merchant, or other person who only receives cotton in payment of accounts due him, or to cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes."

The appellant complains only of these statutes and ordinances in that they violate Article 1, Section 8, Clause 3, of the Constitution of the United States and are a burden on interstate commerce.

By a general provision of each of the chapters of the laws of Mississippi as above stated enacting the privilege license laws of the State of Mississippi a municipality is

authorized to levy a privilege license tax of fifty per cent of the amount that the state may levy according to both of the above mentioned laws. The City of Greenwood levied fifty per cent of the amount against the appellant that the State of Mississippi could levy under each of the above cited laws for each of the said years.

There is nothing on the face of the statutes or the ordinances that indicates a contravention with the constitution of the United States or as interfering with interstate commerce. They are simple enactments by the Legislature of the State of Mississippi admittedly for State purposes. There is no doubt that the Legislature of the State of Mississippi had authority to enact such statutes.

> "*Pullman v. Adams Revenue Agent*, 70 Miss. 841, 30 So., 757, 84 Am. St. Rep. 647.
> So. 781.
>
> *H. Chassaniol v. City of Greenwood*, 148 So. 781.

When the Supreme Court of a state construes a state statute such construction is binding on the Supreme Court of the United States.

> *Anglo-Chilean Nitrate Sales Corp. v. State of Alabama*, 288 U. S. 218, 53 S. Ct. 377, 77 L. ed. 710.
>
> *Osborn v. Florida*, 164, U. S. 650, 41 L. ed. 586.

The Supreme Court of the State of Mississippi has construed the enactments of the Legislature of the State of Mississippi as applying only to intrastate business.

N. O. M. & C. Railroad Company v. State, 70 So. 355; *Pullman v. Adams Revenue Agt.* 78 Miss. 814, 30 So. 757, 84 Am. St. Rep. 647.

These particular ordinances and statutes were construed by the Supreme Court of the State of Mississippi in the case of *H. Chassaniol v. City of Greenwood*, 148 So., 781, and were held to apply only to intrastate commerce.

It is to be noted that the appellant H. Chassaniol is a resident of the City of Greenwood, Leflore County, Mississippi. He buys cotton in the City of Greenwood for his own account to which he takes title. He intends to ship this cotton which he owns and which is at rest in one or more of the compresses in the City of Greenwood. In the Chassaniol case, supra, the court said:

> "The Supreme Court of the United States held as to cotton so stored that it does not become part of interstate commerce. The beginning of interstate commerce is the time when the goods begin their interstate journey thus passing beyond the state's authority, and the domestic or Federal control. *Lemke v. Farmers' Grain Company*, 258 U. S. 50, 42 S. Ct. 244, 60 L. Ed. 458; *Schafer v. Farmers, Grain Co.*, 268 U. S. 189, 45 S. Ct. 481, 69 L. Ed. 909; *General Oil Co. v. Crain*, 209, U. S. 211, 28 S. Ct. 475, 52 L. ed. 754; *McCluskey v. Marysville & N. R. Co.*, 243 U. S. 36, 37 S. Ct. 374, 61 L. ed. 579; *Hammer v. Dagenhart*, 247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101, 3. A. L. R. 649, Ann. Cas. 1918 E, 724."

"The essential character of commerce, not the accident of through bills of lading, is its continuity of movement in foreign commerce, and that determines federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country.

R. R. Commission v. Texas & P. R. Co., 229 U. S. 336, 33 S. Ct. 837, 57 L. ed. 1215. See, also, *I. C. R. R. Co. v. DeFuentes*, 236 U. S. 157, 35 S. Ct. 275, 59 L. Ed. 517, and *R. R. Com. of Ohio v. Worthington*, 225 U. S. 101, 32 S. Ct. 653, 56 L. Ed. 1004."

The appellant is not buying for his principal who lives in another state, but is buying for himself with the intention to ship into another state. If the appellant here was a citizen of another state or foreign country and came into the State of Mississippi and the City of Greenwood to buy and immediately ship cotton to himself or to another in another state or foreign country, then the situation would be entirely different.

In the case of *Dahnke-Walker Milling Company vs. Bondurant*, 257 U. S. 282, 66 L. Ed. 239, the Court had before it the fact of a citizen of one state going into another state for the purpose of buying wheat which was to be delivered to him on both cars of a common carrier and there shipped to his mills in the other state. The Court properly held this to be interstate commerce, the journey from the state having actually begun.

In this case the cotton purchased by the appellant was still a part of the mass of property in this state and the interstate movement had not begun; in fact, the record shows that he bought for future as well as immediate delivery and certainly the cotton purchased by the appellant for future delivery could not be said to be in interstate commerce.

"If the interstate movement has not begun the mere fact that such a movement is contemplated does not withdraw the property from the state's power to tax it.

Coe vs. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 S. Ct. 475; *Diamond Match Company vs. Ontonagon,* 108 U. S. 82, 47 L. Ed. 394, 23 S. Ct. 262.

State of Minn. vs. Geo. Blasius, 78 L. Ed., Page 19, Supreme Court Advanced Opinions.

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of the State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely: That such goods do not cease to be part of the general mass of property in the State, subject as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is

exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule, in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little, except wheat and corn, most of which is intended for export; and so of cotton in the southern states. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the state. And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true, it was said in the case of 'The Daniel Ball; 10 Wall. 565 (77 U. S. bk. 19, L. Ed. 1002); 'Whenever a commodity has begun to *move as an article of trade* from one state to another, commerce in that commodity between the states has commenced. But this move ment does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the state, for the pur-

pose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing."

"Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6. S. Ct. 475.

"No state can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the state, it is a subject of taxation by the state. *A cotton broker may be required to pay a tax upon his business or by way of license, although he may buy and sell cotton for foreign exportation."* (Italics ours).

Nathan vs. State of Louisiana, 8 Howard, 63, 12 L. Ed. 992.

"In *Carson Petroleum Company vs. Vial,* 279 U. S. 94, 73 L. Ed. 623, Text 629, the Supreme Court held as follows: *'In Hughes Brothers Timber Company vs. Minn.,* 272 U. S. 469, 71 L. Ed. 359, 47 Sup. Ct. Rep. 170, pursuant to a contract of sale of logs cut were gathered on the Swamp River in Minn. by the vendors and were floated by river to Lake Superior, and there loaded on to the vendee's vessels and transported to their district in Michigan. This court said:

"That the conclusion in cases like this must be determined from the various circumstances. *Mere intention by the owner ultimately to send* the logs out of the state does not put them in in-

terstate commerce, nor does preparatory gathering for that purpose at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state."

(Italics Ours).

The beginning of the transit which conducts interstate commerce is the point of time that an article is committed to the carrier for transportation, to the state of its destination or started on its ultimate passage.

McCluskey v. Marysville 61 L. ed. 578; *General Oil Co. v. Crain*, 52 L. ed. 754; *Atlantic Coast Line Railroad Co. v. Standard Oil Co.* 72 L. ed. 270; *Diamond Match Co. v. Village of Ontonagon*, 188 U. S. 82, 47 L. ed. 394.

The case of *Stafford v. Wallace*, 258 U. S. 495, 66 L. ed. 735, involved the question of whether Congress had the power to enact the Packers and Stockyard Act of August 15th, 1921, and an interlocutory injunction was applied for and refused by the District Federal Court in which suit it was sought to restrain the enforcement of orders of the Secretary of Agriculture in aid of said Act. The Supreme Court of the United States upheld the Packers and Stockyard Act, stating that Congress had the power under the Commerce Clause of the Constitution to enact an appropriate Legislation governing the subject matter of this suit. Congress had never attempted to enact any Legislation effecting the buying and selling of cotton. If Congress should enact such a law, and the validity of such act

were brought before the Supreme Court of the United States under appropriate facts, then the case of *Stafford v. Wallace* might apply.

We are unable to see how the decision in the case of *Stafford v. Wallace* can apply to the cases at bar. The one construes a Federal Act, and the power of Congress to enact it regarding interstate commerce. The other is a simple privilege license tax included in a chapter of the Mississippi Code on Privilege License and passed admittedly for state purposes.

New Orleans, Mobile and Chicago Railroad Company v. State, 110 Miss. 290, 70 So 355.

In *Bacon v. State of Illinois*, 227 U. S. 502, 57 L. ed. 615 no part of the grain mentioned in the said case was sold or consumed in Illinois, but while it passed through the City of Chicago from the Southern and Western States to the Eastern States, it was made subject to an advalorem tax and as to the right of the State of Illinois to levy this tax the court said:

> "But neither the fact that the grain had come from outside the state, nor the intention of the owner to send it to another state, and there to dispose of it, can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purpose and with full power of disposition. It was not being actually transported, and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the with-

drawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he chose. He might sell the grain in Illinois or forward it, as he saw fit. It was in his possession, with the control of absolute ownership. He intended to forword the grain after it had been inspeected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago, for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way, without discrimination.

Woodruff v. Parham, 8 Wall. 123, 19, L. Ed. 382; *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257, 5 sup Ct. Rep. 1091; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475; *Pittsburg & S. Coal Company v. Bates*, 156 U. S. 577, 39 L. Ed. 538, 6 Inters. Com Rep. 30, 15 Sup. Ct. Rep. 415; *Diamond Mach Co. v. Ontonagon*, 188 U. S. 82. 93-96, 47 L. ed. 394, 398, 400, 23 Sup. Ct. Rep. 365; *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475."

Therefore, in this case the appellant had possession of the property that he had purchased in the City of Greenwood as a cotton buyer. He alleges in his petition that he intended to ship this cotton to other states, but the court

in the Bacon case held that his intention did not make it immune from local taxation. If this principle is applied to an advalorem tax for the payment which the goods itself are liable to be distrained, how much more effectively it would apply to a privilege license which could not be levied against the cotton itself.

The appellant in this case in the City of Greenwood did as Bacon himself did in the City of Chicago; that is, he established a local facility in Greenwood for his own benefit and carried a stock of ten per cent (10%) of his business on hand at all times, not for the benefit of interstate commerce, but for the benefit of his own profit.

In a very recent case styled *Nashville, Chattanooga and St. Louis Railroad Company vs. Wallace*, decided by the Supreme Court of the United States, February 6th, 1933, and reported on page 447 of Advance Sheet No. 8 of the United States Supreme Court Advance Opinions of 77 L. ed. That court has this to say:

> "Appellant, an interstate rail carrier, purchased large quantities of gasoline outside the state of Tennessee and brings it into the state in tank cars from which it is unloaded and placed in its own storage tanks. None of it is sold by appellant, but all is withdrawn and used by it as a source of motive power in interstate railway operation in Tennessee, Kentucky, Alabama and Georgia. Storage of the gasoline is a preliminary step to such use in interstate commerce. The tax is assailed both on the ground that it is imposed on the gasoline while still a subject of interstate commerce in the course of transportation from

points of irigin to points outside the State of Tennessee; and on the ground that it is in effect a tax upon the use of the gasoline in appellant's business as an interstate carrier, and is thus an unconstitutional burden on interstate commerce.

The gasoline, upon being unloaded and stored, ceased to be subject of transportation in interstate commerce and lost its immunity as such from state taxation.

"*General Oil Company v. Crain*, 209 U. S. 211, 52 L. ed. 754, 28 S. Ct. 475; *Bacon v. Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 S. Ct. 299; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 669. 57 L. ed. 1015, 1016, 33 S. Ct. 712; *Hart Refineries v. Harmon*, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188; *Gregg Dyeing Co. v. Query*, 286 U. S. 472, 76 L. ed. 1232, 52 S. Ct. 631,—A.L.R.—. The fact that the oil was, in the ordinary course of appellant's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced. Neither the appellant, the shippers, nor the carrier, at the time of the shipment of the gasoline from points of origin, arranged a destination for any part of the oil other than the appellant's storage tanks in Tennessee. Although in the usual course of business a variable and undefined part of it, when segregated for that purpose, would again be transported across state boundaries, appellant was free to distribute the oil either within or without the state for use in its business or for any other purpose. As nothing in the transaction before the with-

drawal from storage in Tennessee can be said to have given any ascertainable part of the gasoline a destination to points beyond the state, the case is distinguishable from *Carson Petroleum Co. v. Vial*, 279 U. S. 95, 73 L. ed. 626, 49 S. Ct. 292, and *Texas & N. O. R. Co. v. Sabine Tram. Co.* 227 U. S. 111, 57 L. ed. 442, 33 S. Ct. 229. The oil in storage was not a subject of interstate commerce and so was a part of the common mass of goods within the state, subject to local taxation.

General Oil Co. v. Crain, 209 U. S. 211, 52 L. ed. 754, 28 S. Ct. 475; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 655, 57 L. ed. 1015, 33 S. Ct. 712, and *Bacon v. Illinois*, 227 U. S. 504, 57 L. ed. 615; 33 S. Ct. 299 supra; compare *Atlantic Coast Line R. Co. v. Standard Oil Co.* 275 U.S 257, 72 L. ed. 270, 48 S. Ct. 107.

In the case of *Bowman vs. Continental Oil Co.* this Court declared invalid revenue tax that was imposed finally upon entire business conducted, including interstate commerce as well as domestic, but this decision of this Court was rendered before the Supreme Court of New Mexico had construed such a tax as applying only to intrastate commerce. In the opinion in this case the Court said:

> "Upon the question of severability, we are constrained to concur in the view adopted by the district court; and this, notwithstanding our hesitation, in advance of a declaration by the court of last resort of the state, to adopt a construction bringing the law into conflict with the Federal Constitution."

Ohio Tax Cases, 232 U. S. 576, 591, 58 L. ed. 738, 745, 34, Sup. Ct. Rep. 372; *St. Louis*

Southwestern R. Co. v. Arkansas, 235 U. S. 350, 369, 370 59 L. ed. 265, 274, 275, 35 Sup. Ct. Rep. 99."

The appellant relies very strongly upon *Lemke vs. Farmers Grain Company*, 258 U. S. 50, 66 L. Ed. 458, and *Shafer vs. Farmers Grain Company*, 268 U. S. 189, 69 L. ed. 909.

These cases set forth an effort on the part of the Legislature of North Dakota to enact a very comprehensive scheme to regulate the buying and selling of wheat in North Dakota and impose stringent regulations calculated to embarass and impede the shipment of grain from the state. There was practically no market in North Dakota for the grain purchased by the complainant in the Lemke case and the salient parts of the complete statute under attack in that case are set out within the report of the Lemke case. Such a statute cannot be compared with the statute of the State of Mississippi and the ordinances of the City of Greenwood here under consideration.

The grain in the Lemke and Shafer cases was bought for the purpose of shipping them and selling in terminal markets outside of the State of North Dakota. The wheat was bought from the producers and placed in cars for immediate shipment to the terminal market in another state. In the case at bar the cotton is bought by a resident of this state who places it not immediately on bought carriers for interstate shipment, but in compresses to await a time when he desires to ship the cotton. The buyers in the Lemke and Shafer cases are not shown to trade among themselves or to carry any stock for their own profit. The

appellant in this case at bar shows by his petition that he carries ten per cent which he uses for his own benefit and profit. There is no showing that there is any difference so far as the shipping of cotton in interstate commerce is concerned of the ten per cent of appellant's business is engaged in interstate commerce; that is, the handling of the ten per cent does not reduce the profit on the ninety per cent in intertsate commerce.

I, therefore, submit that the privilege tax complained of is not a burden on interstate commerce within the meaning of the Constitution of the United States.

POINT II.

IN CONSTRUING STATUTES IN REFERENCE TO INTERSTATE COMMERCE THIS COURT MAKES A WELL DEFINED DISTINCTION BETWEEN STATUTES LEVYING A TAX AND STATUTES REGULATING COMMERCE.

BRIEF RESUME OF FACTS

The facts as reflected by the record, briefly stated, are as follows:

Long staple cotton is produced in the Mississippi Delta The producer, after having the cotton ginned, transports it to the compress at Greenwood by wagons, automobiles, trucks and railroads.

The cotton is concentrated at the compress at Greenwood for the following reasons:

First: In order that it may be marketed to the best advantage.

Second: In order that the title to the cotton may pass by the exchange of compress receipts.

Third: In order that it may be safely stored until finally shipped from the State.

Fourth: In order that it may be compressed as a preparation for shipping.

The appellant, as a cotton buyer, purchases said cotton under three different circumstances, to wit:

1. He purchases cotton in order to fill a contract entered into prior to its purchase, in which contract he is obligated to deliver said cotton in another state or foreign country.

2. He buys cotton for which he has no contract but with the intention and for the purpose of selling said cotton to purchasers in another state or foreign country.

3. As an incident to his business of buying cotton to be shipped in interstate and foreign commerce, he buys cotton which he sells on the local market.

The cotton is handled as follows:

1. It is stored in the warehouse by the producer or the purchaser for an indefinite time.

2. While so stored it may be bought and sold one or more times.

3. Its final destination is determined by final sale to purchasers outside of the State.

4. After its final destination is determined it is compressed and then delivered to the common carrier.

In the case of *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, a case cited and relied upon by counsel for appellants, the Court, after holding that under the facts in that case the grain buyers were engaged in interstate commerce, held as follows:

> "Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between the state and Federal authority under facts presented, which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of Federal control. Cases of that type are not in conflict with principles recognized as controlling here."

In the case of *Sonneborn Bros. vs. Keeling*, 262 U. S. 506, 67 L. Ed. 1095, the Court held as follows:

> "Counsel for appellants cite the case of *Dahnke-Walker Mill Co. v. Bondurant*, 257 U. S. 282, 290, 66 L. ed. 239, 244, 42 Sup. Ct. Rep. 106, as aiding their argument that a tax on a sale of merchandise in an original package, brought

from another state, is a tax on interstate commerce, and is different from an ad valorem property tax on the merchandise. But that case was not concerned with the power to tax, but rather with the power of a state to prevent an engagement in interstate commerce within her limits, except by her leave. The holding there was that a contract for the purchase of a crop of grain in Kentucky, to be delivered at a railway station in Kentucky, for shipment to Tennesse, conformably to a settled course of business, was an interstate contract which a corporation not authorized by Kentucky to do business in that state might nevertheless make and enforce without incurring the penalty of the state law. It was said in that case (p. 290) that 'where goods in one state are transported into another state for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown v. Maryland*, 12 Wheat. 419, 446, 447, 6 L. ed. 678, 688; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 519, 48 L. Ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. *American Express Co. v. Iowa*, 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182.' But this language has no relevency to show that a tax without discrimination on goods, after the transportation ceases, is a burden on interstate commerce—a proposition negatived in the American Steel & Wire Co. case it cites—or that a different rule should apply to an

advalorem property tax from that in case of a tax on sales."

POINT III.

A PRIVILEGE TAX LEVIED UPON A COTTON BUYER MUST BE TREATED AS IN EFFECT A TAX UPON THE COTTON PURCHASED IN DETERMINING QUESTIONS ARISING UNDER THE FEDERAL CONSTITUTION IN REFERENCE TO THE POWER OF THE STATE TO TAX; THAT IS TO SAY, IF THE STATE COULD LEVY AN AD VALOREM TAX UPON THE COTTON, THEN IT COULD LEVY A PRIVILEGE TAX UPON THE PERSON ENGAGED IN THE BUSINESS OF BUYING SUCH COTTON.

I presume that it wil be conceded that lint cotton or bales of cotton in the State of Mississippi stored in the compress, as set out in the petition in this case, could be taxed as other property in the State is taxed for ad valorem taxes. In fact, all lint cotton in the State on the first day of January of each year would be subject to ad valorem tax for said year, if it were not for the exemption granted by paragraph (I) of Section 3108, Code of 1930.

Until the cotton is actually delivered to the railroad company for transportation beyond the confines of the State the cotton is a part of the general mass of property in the State of Mississippi.

In the case of *Federal Compress & Warehouse Co. vs. E. R. McLean*, Sheriff, No. 30,543, recently decided by Division A, not yet officially reported, the Court holds as follows:

"The cotton, moving through the appellant's warehouse and compress, entered into, and became a part of, interstate commerce when, but not until, it commenced its journey from this state to another state or country; in other words, when the cotton was delivered to the railroad company for transportation into another state or country. This did not occur until it was delivered to the railroad, after being compressed, for transportation. *Coe v. Errol*, 115 U. S. 519, 29 L. Ed. 74; *Diamond Match Co. v. Village of Ontonagon*, 188 U. S. 82, 47 L. Ed. 394."

The question involved in the Federal Court case of *Coe v. Errol and the case of Diamond Match Co. v. Village*, etc., supra, cited by the Supreme Court of Mississippi in the above styled cause was whether or not the State could levy an ad valorem tax on the property involved in the controversy. In this connection see also the following cases:

Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 67 L. Ed. 929;

Hope Natural Gas Co. v. Hall, 274 U. S. 284, 71 L. Ed. 1049;

American Manufacturing Co. v. City of St. Louis, 250 U. S. 459, 63 L. Ed. 1084;

Carson Petroleum Co. v. Vial, 279 U. S. 94, 73 L. Ed. 626;

Hughes Brothers Timber Co. v. Minnesota, 272 U. S. 469, 71 L. Ed. 359;

Atlantic Coast Line Ry. Co. v. Standard Oil Co., 72 L. Ed. 270.

In *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, logs cut in the State of Maine, and others cut in the State of New Hampshire, were floated, in course of transit, down a stream in New Hampshire to the town of Errol in the later state, thence to be floated down another stream or river into the state of Maine. The town of Errol assessed upon the property a county, town, school and highway tax. The tax was sustained by the Supreme Court of the State of New Hampshire as to the logs cut in that state, and abated as to those cut in Maine. The judgment was affirmed by the Supreme Court of the United States. In disposing of the question, Mr. Justice Bradley used the following language:

> "When the products of the farm or forest are collected and brought in from the surrounding county to a town or statian serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination or have started on their ultimate passage to that stage.* * * *
>
> "That such goods do not cease to be part of the general mass of property in the state, subject to such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey. * * * *. It was said in the case of *The Daniel Ball*, 10 Wall. 565 (77 U. S. bk. 19, L. ed. 1002): 'Whenever a commodity has begun to move as an article

of trade from one state to another, commerce in that commodity between the states has commenced.

"But this movement does not begin until the articles have been shipped or started for transportation from one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the state, for that purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing."

In *Diamond Match Company v. Village of Ontonagon*, 188 U. S. 81, 47 L. ed. 394, a bill in equity was filed to restrain the collection of a tax levied under the laws of the State of Michigan. The complainant was a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in the City of Chicago in said state. It was the owner of a large quantity of pine wood, timber, etc., in Ontonagon and other counties

in the State of Michigan. It also owned saw mills located at Ontonagon, Michigan, and at Green Bay, Wisconsin, logs were cut from the forest or floated down the Ontonagon River to its mills at Ontonagon to be manufactured into lumber. In August, 1896, complainant's mills at Ontonagon burned; whereupon, the logs were transported by railroad to Green Bay, Wisconsin, to complainant's mill there located. The complainant contended that the property was in course of transportation in interstate commerce and that the Village of Ontonagon had no authority to levy the tax.

The court in deciding the case quoted with approval from the opinion of *Coe v. Errol*, supra, and in addition, said:

> "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. * * * *.
>
> "In further specialization of these propositions we may say that the cases establish that there may be an interior movement of property which does not constitute interstate commerce, though property come from or be destined to another state. In the one case, though it has not reached its place of disembarkation or delivery it may be taxed. 114 U. S. 622, 29 L. ed. 257, 5

Sup. Ct. Rep. 1091. In the other case, until it be shipped or started on its final journey it may be taxed. 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475."

In *American Manufacturing Company v. St. Louis*, 250 U. S. 459, 63 L. ed. 1084, a statute of the state of Missouri authorized cities to license, tax and regulate manufacturers. In pursuance to this authority, by the ordinance brought in question, in addition to an ad valorem tax, required every manufacturer before doing business to take out a license and thereafter pay a license tax of One Dollar on each $1,000.00 of sales made. A suit was brought in the state court to recover the amount of the tax paid, under the ordinance measured by the amount of sales of goods manufactured in the city and afterwards removed to storage warehouses outside of the state and later sold in other states than Missouri. A judgment at first was given in favor of plaintiff but being reversed by the State Supreme Court, a new trial resulted in favor of the city.

In construing the statute and defining the nature of the tax the State Supreme Court of Missouri, in 198 S. W. 1183, used the following language.

> "We hold that the tax in question is a tax upon the privilege of pursuing the business of manufacturing these goods in the City of St. Louis; * * *."

In affirming the case the Supreme Court of the United States quoted from the opinion of the Supreme Court of Missouri, and further approved the validity of the tax by saying:

"In our opinion the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce. * * *." 250 U. S. 459, 63 L. ed. 1084."

In *Crescent Cotton Oil Company v. State of Mississippi*, 257 U. S. 129, 66 L. ed. ~~166~~, it was held that a non-resident corporation operating a cotton seed oil mill in its home state and cotton gins in Mississippi, and shipping out of Mississippi for use in its oil mills in another state, all of the cotton seed which it purchased in connection with its ginning operations did not make it, by reason of such operation, an instrumentality of interstate commerce, so as to invalidate Mississippi's "anti gin" statute prohibiting any corporation from owning gins where such corporations were interested in the manufacture of cotton seed oil or cotton seed meal. In delivering the opinion, the court said:

"When the ginning is completed, the operator of the gin is free to purchase the seed or not; and, if it is purchased, to store it in Mississippi indefinitely, or to sell or use it in that state, or to ship it out of the state for use in another; and, under the cases cited, it is only in this last case, and after the seed has been committed to a carrier for interstate transport, that it passes from the regulatory power of the state into interstate commerce and under the national power."

In *Carson Petroleum Co. v. Vial*, 279 U. S. 94, 73 L. ed 626, the Supreme Court held as follows:

> "The conclusion in cases like this must be determined from the various circumstances. Mere intention by the owner to send the logs out of the state does not put them in interstate commerce, nor does preparatory gathering for that purpose, at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state."

The court in discussing when a commodity is in the channels of interstate commerce, said further:

> "An instance of interruptions of railroad transportation is *Bacon v. Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299. Bacon, the owner of the grain, and the taxpayer, had bought it in the South and had secured the right from the railroads transporting it to remove it from their custody to his private grain elevator in Illinois where for his own purpose he proceeded to inspect, weigh, clean, clip, dry, sack, grade, or mix it, and had power under his contract with the carriers either to change its ownership, consignee or destination or to restore the grain, after the processes mentioned, to the carrier to be delivered at the destination in another state according to his original intention. The question was whether the removal of the grain to his private elevator interrupted the continuity of the transportation and made the grain subject to local taxation there. It was held that it did; that the

> grain was locally dealt with in the interest of the owner while it was in his custody and was subject to his complete disposition for a collateral business purpose of his own."

Therefore, the point of time when a commodity enters the channels of interstate commerce, is the time when an article of commerce is committed to the carrier for transportation to the state of its ultimate destination.

In *McCluskey v. Marysville*, 243 U. S. 36, 61 L. ed. 578, the court used the following words:

> "The beginning of the transit which constitutes interstate commerce 'is defined in *Coe v. Errol* to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage.'"

In *General Oil Company vs. Crain*, 209 U. S. 212, 52 L. ed. 754, it was held that oil shipped from Pennsylvania and destined ultimately for points in Arkansas, Louisiana and Mississippi, is not property in interstate commerce, so as to be exempt from State taxation or inspection laws while it is held at a distributing point maintained by the shippers in Tennessee, at which point such oil is unloaded from tank cars into various tanks, barrels and other receptacles and from which it is forwarded to its final destination. The court said:

> "Property, therefore, at an intermediate point between the places of shipment and ultimate destination, may cease to be a subject of interstate commerce. Necessarily, however, the

length and purpose of the interruption of transit must be considered. * * * *

"We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws. *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 356, 43 L. ed. 195; 18 Sup. Ct. Rep. 862. The difference, if any exists, it is not necessary to observe. The cases based on the taxing power show the contentions of plaintiff in error are without merit; in other words, show that its oil was not property in interstate commerce."

In *Merchants Exchange of St. Louis v. State of Missouri on the Relation of John T. Barker, Attorney General*, 248 U. S. 365, 63 L. ed. 300, the Supreme Court held that a statute of Missouri providing that in cities having more than 75,000 inhabitants, buildings used for the storage of grain be deemed public warehouses, and prohibiting the issuance of weight certificates by other than authorized, bonded state weighers, did not violate the Constitution of the United States. The court said:

"Section 63 does not violate the commerce clause of the Constitution. The contention that it does was rested below solely on the ground that the prohibition, as applied to grain received from or shipped to points without the state, burdens interstate commerce. It clearly does not. *Pittsburg & S. Coal Co. v. Louisiana*, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423. But the additional contention is made here that all state

regulation of the weighing of grain was superseded by the United States Grain Standards Act, approved August 11, 1916 (39 Stat. at L. 482, chap. 313.) That act (which is part B of Chapter 313) relates exclusively to the establishment by the Secretary of Agriculture of standards of quality and condition. It does not in any way refer to the weighing of grain. And part B of chapter 313 by Sec. 7 (p. 484), like part C, the United States Warehouse Act (which does contain some reference to weighing), by Section 29 (p. 490), makes manifest the purpose of Congress not to supersede state laws for the inspection and weighing of grain, but to co-operate with state officials charged with the enforcement of such state laws. The Missouri act is not superseded by or in conflict with the Federal Legislation."

In *Hope Natural Gas Company v. Hall, State Tax Commissioner of West Virginia, et al,* 274 U. S. 284, 71 L. ed. 1049, the Supreme Court upheld a statute of the State of West Virginia levying an occupation tax on persons engaged in producing for sale natural gas. The Gas Company was engaged in producing natural gas in West Virginia and was transporting it directly from the well to another state where it was sold. The Supreme Court held that the statute did not violate the Federal Constitution.

In *Oliver Iron Mining Company v. Lord,* 262 U. S. 172, 67 L. ed. 929, the statute of Minnesota levied a tax upon each person "engaged in the business of producing iron ore or other ores." The plaintiff was engaged in mining ore and loading it on cars and shipping it in interstate com-

merce. The statute was upheld and in so doing the court said:

> "We shall therefore treat the tax as an occupation tax in dealing with the contentions presented.
>
> "The chief contention is that mining, as conducted by the plaintiffs, if not actually a part of interstate commerce, is so closely connected therewith that to tax it is to burden or interfere with such commerce, which a state cannot do consistently with the commerce clause of the Constitution of the United States.
>
> "The facts on which the contention rests are as follows: The demand or market within the state for iron ore covers only a negligible percentage of what is mined by the plaintiffs. Practically all of their output is mined to fill existing contracts with consumers outside the state and passes at once into the channels of interstate commerce. Three-fourths of it is from open-pit mines and one-fourth from underground mines. At the open-pit mines, empty cars are run from adjacent railroad yards into the mines and there loaded. Steam shovels sever the ore from its natural bed and lift it directly into the cars. When loaded the cars are promptly returned to the railroad yards, where they are put into the trains which start the ore on its interstate journey. The several steps follow in such succession that there is practically continuity of movement from the time the ore is severed from its natural bed. The operations within the mine and the movement of the cars into and out of the mine are conducted by the plaintiffs. The subsequent transporta-

tion is by public carriers. At the underground mines the plaintiffs dig the ore, bring it to the surface through shafts, and put it in elevated pockets where it readily can be loaded into the cars. The subsequent movements are much the same as at the open-pit mines, but their continuity is not so pronounced. Some of the ore from both kinds of mines—between 10 and 20 per cent—is concentrated by washing or beneficiated after coming out of the mine and before starting out of the state; but our conclusion respecting the usual operations renders this deflection immaterial. * * * *

"The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

In *Philadelphia and Reading Railroad Co. v. Commonwealth of Pennsylvania*, 82 U. S. 164, the Court held as follows:

"No doubt every tax upon personal property or upon occupations, business or franchises, affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. * * * *

"The tax is laid upon the gross receipts of the Company; laid upon a fund which has become the property of the Company, mingled with its other property, and possibly expended in improvements

> or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury."

We have already stated in the *Natural Gas Company* and *Oliver Iron Mining Company* cases, supra, it appears that the plintiffs bought the gas and coal before it was produced, and that they bought it for the purpose of selling it in interstate commerce, and did so sell it. However, the court held squarely that the mining of the coal and the production of the gas was not interstate commerce and upheld the constitutionality of the statutes imposing an occupation tax on the gas company and the coal company.

Rowland C. Heisler v. Thomas Colliery Co., et al, 260 U. S. 245, 67 L. Ed. 237, was presented on a writ of error to the Supreme Court of the State of Pennsylvania to review a judgment affirming a judgment of the Court of Common Pleas, dismissing a suit brought to enjoin the enforcement and payment of a tax on anthracite coal.

In 1921 the commonwealth passed an Act providing that from and after its passage, each ton of anthracite coal mined, washed or screened, or otherwise prepared for market in the commonwealth, should be subject to a tax of one and one-half per cent of the value thereof, when prepared for market. The bill filed by plaintiff in error assailed the Act of 1921 as being offensive to the Fourteenth Amendment to the Constitution of the United States, also the right of the State to impose the tax, as being a regulation of interstate commerce, protected by the commerce clause of the Federal Constitution.

In disposing of the case with reference to whether or not said statute violated the interstate commerce clause of the Federal Constitution the court said:

> "We may, therefore, disregard the adventitious considerations referred to and their confusion, and, by doing so, we can estimate the contention made. It is that the products of a state that have, or are destined to have, a market in other states, are subjects of interstate commerce, though they have not removed from the place of their production or preparation.
>
> "The reach and consequence of the contention repel its acceptance. If the possibility, or, indeed, certainity, of exportation of a product or article from a state, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries; it would nationalize and withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to states other than those of their production.
>
> "Other cases have decided the same and afford illustrations of it. *Cornell v .Coyne,* 192

U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 57 L. ed. 1015, 33 Sup. Ct. Rep. 712; *Bacon v. Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. R. 299; *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 66 L. ed. 975, 42 Sup. Ct. Rep. 570."

In the case of *Utah Power & Light Co. v. Pfost*, 286 U. S. 163, 76 L. ed. 1038, Mr. Justice Sutherland delivering the opinion of the court, said:

> "It is apparent that in the last analysis the question we are called upon to solve is this: Upon the facts of the present case is the generation of electrical energy, like manufacture or production generally, a process essentially local in character and complete in itself; or is it so linked with the transmission as to make it an inseparable part of a transaction in interstate commerce? From the strictly scientific point of view the subject is highly technical, but in considering the case, we must not lose sight of the fact that taxation is a practical matter and that what constitutes commerce, manufacture or production is to be determined upon practical consideration."

In the case of *State of Minnesota v. Blasius*, No. 7, October Term 1933, decided November 6th, 1933, not yet officially reported, the Court found the facts as follows:

> "The material facts, as found by the trial court, are these: At the St. Paul Union Stockyards, thousands of head of livestock arrive daily

by railroad and truck and are promptly sold and moved. The livestock comes from the state of Minnesota and other States throughout the northwest. The class of livestock which Blasius buys on the market are those that go immediately thereafter into the hands of feeders or growers within and without the State. He has not dealt in livestock for immediate slaughter. Thus, it was the practice of Blasius to go upon the market at the stockyards and buy livestock to meet the requirements of his trade, and in the regular course of his business practically all cattle purchased by him were sold and shipped to non-residents of the State, although selling and shipping to residents of the State did sometimes occur.

"The eleven head of cattle in question came to the yards from some point outside the State of Minnesota; they had been consigned to commission firms for sale at the South St. Paul market; the consignors 'had no intent to transport said cattle to any other place than South St. Paul, nor did have any intent that such cattle should be transported to any particular place after their sale'; they were bought by Blasius from the commission merchants on April 30th, 1929, and on May 1st, 1929, the tax date, they were owned by him and 'had not been entered with any carrier for shipment to any point', but were being offered for sale on the market; seven of the eleven head were sold on that day to a non-resident purchaser and were immediately shipped by the purchaser to points outside the State of Minnesota; the remaining four head were similarly sold and shipped on the following day. After his purchase Blasius placed the cattle in pens leased by him from the

stockyards company; he paid for their feed and water up to the time of resale."

The Court held as follows:

"But because there is a flow of interstate commerce which is subject to the regulating power of Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a state may not lay a non-discriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the State. The distinction was recognized in *Stafford v. Wallace*, supra, pp. 525, 526, where the Court cited, as an illustration, the case of *Bacon v. Illinois*, 227 U. S. 504, in which such a non-discriminatory property tax was sustained. And the Court in the Stafford case quoted from the opinion in the Bacon case (supra p. 516) the following statement of the distinction: 'The question' (that is, as to the validity of the state tax) 'it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority.'

* * * * * * *

"If the interstate movement has not begun the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. *Coe v. Errol*, 116 U. S. 517; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82. If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxa-

tion, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement. *Coe v. Errol*, supra; *Kelly vs. Rhoads*, 188 U. S. 1; *Champlain Company v. Brattleboro*, 260 U. S. 366. Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. *Champlain Company v. Brattleboro*, supra, p. 377; *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498; *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *Carson Petroleum Co. v. Vial*, supra. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if it appears 'that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation'. *Hughes Bros. Co. v. Minnesota*, 272 U. S. 469, 476."

The case at bar is the same in principle as the Minnesota case; that is, the cotton is purchased by the cotton buyer at a time when such cotton is a part of the general mass of property in the State, and at a time when said cotton has not yet begun its interstate movement.

My contention is, therefore, that where the property in subject to an ad valorem tax, then a person dealing in such property may be required to pay an excise or privilege tax for so doing.

Brown v. Maryland, 12 Wheat, 419, 6 L. Ed. 678. In this case, which is a leading case on the question, the opinion of the Court being delivered by Chief Justice Marshall, the Supreme Court of the United States was considering a privilege tax required of an importer to sell goods imported into the State of Maryland. The Court held that the goods were imported and that at the time the tax accrued had not become a part of the general mass of the property in the State of Maryland. An ad valorem tax, therefore, could not be collected, and inasmuch as an ad valorem tax could not be collected, then a privilege tax could not be required to sell such property. The Court holding as follows:

> "But if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.
>
> "It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347. The State of Missouri enacted a statute taxing the right to sell goods, wares and merchandise which was not the growth, product or manufacture of the State of Missouri. The Supreme Court, in determining this case, cited with approval the case of *Brown v. Maryland*, supra, and held as follows:

"So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the state, *must be regarded as a tax upon such goods themselves*; and the question presented is, whether legislation, thus discriminating against the products of other states in the conditions of their sale by a certain class of dealers, is valid under the Constitution of the United States."

Kehrer v. Stewart, 109 U. S. 60, 49 L. Ed. 663. In this case the Supreme Court of the United States was considering a privilege tax levied by the State of Georgia upon a person engaged in selling meat in said state. It appears that Nelson Morris & Company, citizens of Illinois, had a place of business in the State of Georgia; that it employed clerks or agents to sell its meats in the State of Georgia. Some of the meats were ordered by these agents from the company and delivered direct to the consumer or purchaser. The Court held that was interstate commerce and not taxable. The company also shipped meats to the agents and these meats were sold to local customers. The Court held that this was not intertsate commerce and was subject to the prviilege tax levied by the state. The Court held as follows:

"It was admitted by the supreme court of Georgia, in its opinion, and by both parties hereto, that a tax upon the seller of goods is a tax upon the goods themselves (*Brown vs. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Welton vs. Missouri*, 91 U. S. 275, 23 L. Ed. 347). * * * *

"This decision was correct. In carrying on the domestic business, petitioner was indistinguishable from the ordinary butcher, who slaughters cattle and sells their carcasses, and in principle it made no difference that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta for sale and consumption in the ordinary course of trade. Upon arrival there they became a part of the taxable property of the state. It made no difference whence they came and to whom they were ultimately sold."

Eastern Air Transport v. S. C. Tax Commission, 52 Fed. (2nd) 456. The State of South Carolina levied a privilege tax on the sale of gasoline. The Eastern Air Transport was engaged in interstate commerce and bought gasoline from a concern in South Carolina and was required to pay the sales tax thereon. The suit was brought on the theory that the Transport Company was not liable for the tax inasmuch as the gasoline was used in interstate commerce. The Court held as follows:

"We attach no importance to the fact that the tax is described in the statute as a privilege or license tax; for, where such tax is measured by sales, it is in effect a sales tax, whatever it may be called. *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 222, 48 S. C. 451, 72 L. ed. 857, 56 A. L. R. 583. And, although not a property tax within the meaning of the South Carolina Constitution, but an excise tax (*Gregg Dyeing Co. v. Tax Commission* (C. C.) ..... S. E. .....), it must be treated as in effect a tax upon the property sold for determining questions arising under the federal Constitution. *Fahrer v. Stewart*, 197 U. S.

60, 25 S. St. 403, 49 L. ed. 663; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Brown v. Maryland*, 12 Wheat. 425, 6 L. ed. 678. But the rule is that the right of a state to tax property within its borders or transactions therein occurring is practically unlimited, except that it may not tax interstate commerce or burden such commerce by taxing the instrumentalities used in carrying it on or violate other constitutional provisions not here material. The sale, being completed within the state of South Carolina, is, of course, not a transaction in interstate commerce. The question in the case, then, comes to this, whether at the time of the sale, which is the transaction by which the tax is measured, the gasoline which is the subject of the sale can be regarded as an instrumentality of such commerce."

The opinion of the District Court was affirmed by the Supreme Court of the United States, the opinion being reported in 285 U. S. 147, 76 L. ed. 673. The Supreme Court held as follows, and cited in support of said holding the cases hereinbefore cited and quoted from:

"If such a license tax for the privilege of making sales within the state were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the state and hence subject to the State's authority to tax, although the property might actually be used in interstate commerce."

In the case of *Edelman v. Boeing Air Transport*, No.

289, U. S. 249, 77 L. ed. 1155, the Court held as follows:

"Respondent maintains an airplane service for transportation in interstate commerce of passengers, mail and express with airports at Cheyenne and Rock Springs. It purchases gasoline both within and without the State, which it intermingles and stores in tanks at the two airports. It pays the tax without objection on the gasoline which it purchases within the state, and on which the tax has not been paid by the wholesaler, as well as on all gasoline which it sells within the State at its airports or withdraws from the tanks for local use. But it contends, and the court below held, that the tax cannot validly be applied to the gasoline imported from outside the State, stored in tanks at the airports and used for 'filling' the interstate airplanes in which it is eventually consumed.

* * * * *

"As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either in coming into or on going out. It is at the time of withdrawal alone that 'use' is measured for the purposes of the tax. The stored gasoline is deemed to be 'used' within the State and therefore subject to the tax, when it is withdrawn from the tanks. Compare No. 176, *Nashville C. & St. L. R. Co. v. Wallace*, decided February 6, 1933 (288 U. S. 249, ante, 730, 53 S. Ct. 345); *Gregg Dyeing*

Co. v. Query, 286 U. S. 472, 76 L. ed. 1232, 52 S. Ct. 631, 84 A. L. R. 831; *Hart Refineries v. Harmon*, 278 U. S. 499, 73 L. ed. 475, 49 S. Ct. 188; *Bowman v. Continental Oil Co.*, 256 U. S. 642, 65 L. ed. 1139, 41 S. Ct. 606.

"A state may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the state, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in No. 176, *Nashville, C. & St. L. R. Co. v. Wallace*, supra. There it was pointed out that 'there can be no valid objection to the taxation of the exercise of any valid right or power incident to . . . ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson v. Kentucky*, 279 U. S. 245, 73 L. ed. 683, 49 S. Ct. 279.' As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was completed before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce to transgress constitutional limitations."

American Airways, Inc., vs. Grosjean, No. 546, October Term 1933, was a case similar to the one last cited, and was affirmed recently by this Court on the authority of the last cited case.

From the record in this case it appears clearly and beyond controversy that at the time the cotton is bought by

appellant that it is a part of the general mass of property in the State of Mississippi; that it is subject to the jurisdiction of the State; that it is liable for an ad valorem tax, and under the principles of law announced in the above cited cases, the appellant, dealing in or purchasing said cotton as set out in the record in this case may be required to pay a privilege tax for so doing and that such tax is not a burden upon nor a regulation of interstate commerce.

POINT IV.

AN AD VALOREM TAX MAY BE LEVIED UPON THE COTTON AT ANY TIME BEFORE THE COTTON ENTERS THE CHANNELS OF INTERSTATE COMMERCE AND A PRIVILEGE TAX MAY BE LEVIED UPON THE PERSON ENGAGED IN THE BUSINESS OF BUYING SUCH COTTON AT ANY TIME BEFORE IT ENTERS THE CHANNELS OF SUCH COMMERCE.

After a careful and diligent search of the authorities I have been unable to find any decision of the Supreme Court of the United States where the facts are on all fours with the facts in this case; that is, I have not been able to find a decision which construes a statute which imposes a privilege tax or an excise tax upon the right to purchase property in one State, which afterwards is sold in interstate commerce. However, there are numerous cases that, in my opinion, are analagous to the principle herein contended for. That is that line of cases which construes statutes which levy a privilege tax on the right to sell property that has been transported in interstate commerce into the state levying a tax.

The rule is well settled that where goods are shipped from another state into the taxing state that either an ad valorem tax on the goods or a privilege tax for selling the goods may be levied as soon as such goods come to rest within the taxing state.

Woodruff vs. Parham, 75 U. S. 123, 19 L. ed. 382. The City of Mobile levied a privilege tax on commissioner merchants and auctioneers. The plaintiff in said cause had sold as auctioneer and commissioned merchant a large amount of goods for others and also on his own account, and claimed that as to such goods as were brought into the State of Alabama from other states of the Union and sold by him at wholesale in the original and unbroken packages that he was not liable for the tax; that the ordinance attempting to tax him was in violation of the Constitution of the United States.

I desire to emphasize the fact in this case that the plaintiff was selling goods for a non-resident of the State and that such goods had been shipped into the State of Alabama by interstate commerce. However, the Court after reviewing numerous decisions held that the statute was constitutional and the plaintiff was liable for the tax. This was clearly a tax on the right to sell goods that had been introduced into the state in interstate commerce. The Court held as follows:

> "Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in

those transactions, we are forced to the conclusion that no intention existed to prohibit, by this clause, the right of one state to tax articles brought into it from another. If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the Constitution as thus construed.

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts who deals only in wholesale, if he purchases his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all the citizens."

See also *Hinson vs. Lott*, 75 U. S. 148, 19 L. ed. 387, wherein it was held that a person who sold whiskey in Alabama in the original package after such whiskey had been shipped to him in interstate commerce and owned by a non-resident of the State, was liable for a privilege tax for selling such whiskey.

Brown vs. Houston, 114 U. S. 622, 29 L. ed. 257. A resident of the State of Pennsylvania shipped coal to the

City of New Orleans in Louisiana in barges. The agents of the owner of the coal kept such coal, delivered it on the barges and sold same only in barge load lots. The taxing authorities of Louisiana undertook to levy and collet an ad valorem tax on the coal. The Court held as follows:

> "This being the recognized law, the question then arises whether the assessment of the tax in question amounted to any interference with or restriction upon the free introduction of the plaintiff's coal from the State of Pennsylvania into the State of Louisiana, and the free disposal of the same in commerce in the latter State; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the states; or only to an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the powers of the State until Congress shall see fit to interfere and make express regulations on the subject.
>
> "As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that state to some other place place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year, or two years, or only for

a day. It had become a part of the general mass of property in the state, and as such it was taxed for the current year (1880) as all other property in the City of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the products of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated."

This was an attempt by the State of Louisiana to collect an ad valorem tax on the coal in question. However, under the principles of law announced in the decisions cited under Division III of this brief, a privilege tax could have been levied as well.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538. The American Steel and Wire Company was a corporation created under the laws of New Jersey, its situs being in the State of New Jersey but its principal office was situated in Chicago, Illinois. This corporation manufactured wire nails, etc., and shipped these goods in large quantities to Patterson Transfer Company, Memphis, Tennessee. The Transfer Company acted as the agent of the manufacturer; that is, the Transfer Company would receive and store the articles in question. The manufacturer would procure orders for such goods in Tennessee, Mississippi, and other states, and the manufacturer would then give the Patterson Transfer Company notice of the purchaser and the amount, quality and kind of goods purchased. The Transfer Company would then make delivery.

It will be noted that the Transfer Company only received these goods and delivered them on instruction from the owner thereof; that the owner was a non-resident of the State of Tennessee, shipped the goods to Memphis in interstate commerce and after selling them, they were delivered in interstate commerce.

The statues of Tennessee levied a general ad valorem tax upon all property in the State, and it also levied a merchan'ts tax or merchant's privilege tax on merchants in Tennessee. The term "merchant" is defined by the statute and quoted in the opinion.

The State of Tennessee undertook to collect on the goods hereinbefore mentioned a general ad valorem tax and also the merchants privilege tax.

The American Steel & Wire Company paid the tax in question under protest and sued to recover same. The Supreme Court of the United States denied recovery, holding as follows:

> "Assuming that the goods concerning which the state taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another state constituted an importation, in the constitutional signification of that word, it is clear that they could not be directly or indirectly taxed. But the goods not having been brought from abroad, they were not imported in the legal sense, and were subject to state taxation after they had reached their destination and whilst they were held in the state for sale. This is as conclusively

foreclosed by the decisions of this court as is the doctrine resting upon the decision in *Brown v. Maryland; Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091. The doctrine upon upon which the cases rest was this,—that imports, in the constitutional sense, embrace only goods brought from a foreing country, and consequently do not include merchandise shipped from one state to another. The several states, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the states had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the state."

Banker Bros. Co. vs. Pennsylvania, 222 U. S. 210, 56 L. Ed. 168. The Banker Brothers Company was a corporation doing business in Pittsburg, Pennsylvania. The George M. Pearce Company was a corporation engaged in the business of manufacturing automobiles in Buffalo, New York. The Pearce Company agreed to sell Banker Brothers Company automobiles at 20% less than the list price. Banker Bros. Company did not keep any automobiles in stock. It would secure orders from residents of Pennsylvania. When the order was secured it would transmit the down-payment to the Pearce Company with the order for the automobile. If the Pearce Company accepted the order it would ship the automobile ordered to Banker Bros. Company in Pennsylvania. The Banker Bros. Co. would deliver it to the purchaser.

The statutes in Pennsylvania levied a privilege tax of 1% on sales of automobiles in Pennsylvania. The State

undertook to collect this 1% tax on $351,000.00, the amount of sales made in the manner herein outlined. The Company undertook to defeat the payment of the tax on the ground that it was engaged in interstate commerce.

The Supreme Court held that the sale of the automobiles was made in Pensylvania; that when the railroad company delivered the automobile to Banker Bros. Company that it had come to rest in the State of Pennsylvania; that it was bought in Pennsylvania and subject to be taxed in said State. The Court upheld the levy of said tax.

This case is clearly analagous to the case at bar. In the case cited the Banker Brothers Company procured a contract with the Pearce Company by which it agreed to sell Banker Brothers automobiles when ordered. In other words, the Banker Brothers Company had a contract to purchase the automobiles from the Pearce Company before it made any contracts for the sale thereof in Pennsylvania. The order by the purchaser was given to Banker Brothers Company when the car was in another state. It was shipped from such other state to the taxing state in interstate commerce. It is clear that both Banker Brothers Company and the Pearce Company were engaged in interstate commerce. However, the Court held that inasmuch as the automobile, as soon as it was delivered to Banker Brothers Company, was taxable in the State of Pennsylvania, that such state might levy a privilege tax to sell such automobile.

Wagner vs. Covington, 251 U. S. 99, 64 L. ed. 157. This was a suit by the manufacturer of soft drinks to recover taxes paid for the privilege of selling soft drinks at wholesale. The soft drinks were manufactured in Ohio and

transported by wagon into Kentucky and there sold in the original package from the wagon. The Court held that the tax was valid.

Sonneborn Bros. vs. Keeling, 262 U. S. 506, 67 L. ed. 1095. The Court states the question and its decision as follows:

> "The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas to their warerooms or warehouse in Texas, there held for sales in Texas in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sale and delivery in Texas.
>
> "Our conclusion must depend on the answer to the question: Is this a regulation of, or burden upon, interstate commerce? We thing it is neither. The oil had come to a state of rest in the warehouse of the appellants, and had become a part of their stock, with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property, or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to the origin, would be neither a regulation nor a burden on the interstate commerce of which this oil had been the subject."

Gulf Fisheries vs. MacInerney, 278 U. S. 124, 72 L. ed. 495. The State of Texas enacted a statute and levied a privilege tax on the privilege of selling fish. The amount of the tax was fixed by the amount of the fish sold. The Court stated the facts and held as follows:

> "The fish are caught in the Gulf of Mexico and are landed, in bulk, by the fishing boats on the wharf of the Galveston Wharf Company. That is the Gulf Fisheries Company's only place of business. And there it has the privileges required for the conduct of its business. It has space for unloading the fish; has several large bins or ice boxes for storage, handling and reicing; has space for loading fish on express cars; and has space for the office work incident to the loading, selling and shipping. After the fish are unloaded from the vessels, all are weighed and washed. All are immediately re-iced to prevent spoiling. About 75 per cent are there beheaded and gutted; 7 to 10 per cent are gutted and gilled with heads on; the remainder are left for sale without beheading or removing gills or entrails. All, except 15 or 20 per cent which are sold to wholesale dealers within the city, are put into barrels, loose with ice, ready for shipment in filling orders. None are placed in cold storage plants. All are shipped from the wharf as fast as they can be re-iced, washed, handled and loaded as above stated. Nearly all are shipped on the day they are unloaded from the boats. Occasionally, some are held in the ice boxes on the wharf for more than forty-eight hours. All are sold to wholesale dealers in quantities of from 50 to 400 pounds. None are sold to retailers.

"The tax is laid, not according to the weight of the fish when landed, but upon the fish sold. All that is sold, has been handled as above stated. None of it has remained in its original condition. None is in the original package, and little in its original form. This is obviously true of the 75 per cent which is beheaded and gutted and of the 7 to 10 per cent more which is gutted and gilled with the heads on. But the small remainder is, when sold, no longer in its original condition. Before sale, it is washed and re-iced. It is taken from the bulk and put loose with ice in barrels. And all this has been done on the wharf. These facts make inapplicable cases like *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Low v. Austin*, 13 Wall. 29, 20 L. ed. 517; *Cook v. Pennsylvania*, 97 U. S. 566, 23 L. ed. 1015. All the fish sold have, after landing and before laying the tax, been so acted upon as to become part of the common property of the state. They have lost their distinctive character as imports and have become taxable by the state. Compare *Sonneborn Bros. v. Cureton* (*Sonneborn Bros. v. Keeling*) 262 U. S. 506, 67 L. ed. 1095, 43 Sup. Ct. Rep. 643."

This case is clearly analagous to the case at bar. It appears from the record in the case at bar that the appellant sells a part of the cotton purchased in Mississippi to persons in foreign countries. However, it further appears that the cotton is purchased and delivery is made by the seller in the State of Mississippi, and after the appellant has acquired title to and possession of the property, then it is compressed before being shipped out of the State. The transaction is clearly a local transaction and the cotton is

not shipped out in the original package or original condition, or in the same form as when purchased. If it can be said, as it was said in the above mentioned case, that washing and re-icing fish changes the original package, or changes the form, then clearly compressing cotton for exportation changes it in both form and package, and the appellant would clearly be liable for the tax for purchases made in Mississippi.

REPLY TO APPELLANT'S BRIEF

Practically all of appellant's brief has been answered in the arguments heretofore made, and such arguments will not be repeated here.

However, under Point II of appellant's brief, they contend that "the privilege tax levied being inseparable and indivisible cannot be exacted from appellant should it be held a part of the business of appellant is in interstate commerce."

Under this point counsel for appellant admit that the supreme Court of the State has held that the intrastate business of appellant may be taxed and that it has been taxed by the ordinance and statutes in question, and that this Court is bound to follow the decisions of the Supreme Court of Mississippi.

Plaintiff, however, contends as follows: "We, however, submit that where the business is inseparable and indivisible the so-called intrastate commerce is a concomitant and inextricable part of the interstate business, and where one cannot be carried on without the other, the tax is unenforceable."

On page 12 of the record, it is shown that it is the custom among cotton buyers and producers that when a producer has a number of bales of cotton that all of the cotton is sold even though a part of it cannot be used to fill the contracts made theretofore by the purchaser. However, this is merely a custom and it certainly cannot be said that a cotton buyer would be required to purchase any part of the cotton for which he did not have a contract.

In making this argument counsel evidently have reference to the purchase of what is referred to in the record as "overs". However, the Supreme Court of Mississippi held that appellant was engaged in intrastate commerce when purchasing about thirty per cent of the cotton purchased; that is, the purchase of the cotton trucked or hauled into the compress at Greenwood was an intrastate transaction as well as the purchase of such "overs."

We contend that inasmuch as the appellant purchased the cotton before it entered the channels of interstate commerce and while it was a part of the general mass of property in the State of Mississippi that the purchase of all of such cotton was intrastate commerce and not interstate commerce.

In *N. O. M. C. R. R. Co. v. State*, 110 Miss. 290, the Supreme Court of Mississippi construed a statute which levied a privilege tax at so much per mile on railroads operating in the State to be a tax on intrastate commerce and not on interstate commerce. The Court stated as follows:

> "Taking the act by the four corners and keeping in view the object to be attained, we find

this statute a part of the general scheme for levying privilege taxes on the several and various kinds of business, trades, and professions done, practiced and carried on in Mississippi. The state in its sovereign capacity is exacting from those who do business and practice and enjoy their several trades and professions a tax as a condition precedent to the right of exercising the privileges. The subject of the tax in each case is the party or corporation doing business, plying his trade, or practicing his profession in Mississippi, and not, of course, in a foreign state or country. The business sought to be taxed is, in each instance, the business done within the confines of our own state. In the case of appellant the tax sought to be imposed was certainly intended to be upon the business enjoyed by it in Mississippi and as a domestic corporation. Every intelligent man knows, and the legislature in enacting this law well knew, that a tax could not be imposed by our legislative department on interstate commerce and that no law could be passed burdening interstate commerce or seriously embarrassing railroads in doing such business, or in doing business for the United States government. It is, therefore, unreasonable to assume that the legislature had any intention of burdening or embarrassing interstate commerce."

In *Pullman Company vs. Adams,* 78 Miss. 714, the State statute levied a privilege tax upon Pullman Companies operating cars in the State of Mississippi and fixed the tax at so much a mile. The company contended that its intrastate business was done at a loss and the tax was

a burden on interstate commerce. The Court held the tax valid as follows:

> "The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid. In *Telegraph Co. v. Wirt Adams, Revenue Agent*, 71 Miss. 565, afterwards affirmed by the United States Supreme Court, this court said: 'Exery tax is a burden, and to the extent imposed, is an interference with the pursuit of business upon which it is laid. If the business is partly interstate commerce, then that commerce is incidently affected and interfered with by every tax, of any nature whatever, that may be levied on it. In the case at bar there is no direct burden upon interstate commerce; there is no further interference with it than will be found necessary to result from the imposition of any burden of taxation in any shape'."

In each of the above cited cases the two classes of business were inseparable; that is, neither of said companies would have engaged in intrastate commerce if it had not been necessary to or an incident to its interstate commerce.

It had been the custom of the Pullman company to do this intrastate business, but the Court sustained the tax.

We, therefore, conclude that the fact that two classes of business are closely allied and the fact that appellant engages in intrastate commerce solely because he is engaged in interstate commerce will not allow him to escape the tax of which he complains.

CONCLUSIONS

We, therefore, most respectfully submit that the privilege tax levied by the laws of Mississippi and the ordinances of the City of Greenwood are:

1. The valid exercise of the power of the State and City to tax.

2. That said tax does not impose a burden on interstate commerce.

3. That a person who is engaged in the business of the purchase of cotton when such cotton is a part of the mass of property in Mississippi and before it has entered the channels of interstate commerce is not engaged in interstate commerce.

We, therefore, most respectfully submit that the opinion of the Supreme Court of Mississippi should be affirmed.

Respectfully submitted,

W. S. VARDAMAN, JR.,
J. A. TYSON,
A. H. BELL,
J. A. LAUDERDALE,
Attorneys for Apellee.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

H. CHASSANIOL, Appellant,

vs.

CITY OF GREENWOOD, Appellee.

No. 428

BRIEF FOR APPELLANT

PETITION FOR REHEARING AND FOR ENLARGEMENT OF TIME IN WHICH THE MANDATE SHALL ISSUE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, H. Chassaniol, appellant in the above styled cause, by his attorney, hereby petitions for a rehearing by the Court and for an enlargement of the time in which the mandate shall issue, and as grounds for this petition, says:

The opinion holds that the growing, ginning, transportation to the compress, compressing, and buying of the cotton from the grower, are each but steps in preparation for the sale and shipment in interstate or foreign commerce, the buyer becoming the absolute owner of the cotton when he buys it from the grower.

In this case the buyer first sells in interstate or foreign commerce, and then buys the cotton for the purpose of shipping it on the contracts which he has entered into. The court holds, in substance, that the transaction between the buyer and the mill is interstate commerce, but that the transaction between the buyer and the grower is intrastate commerce.

The case of Shafer, Attorney General, vs. Farmers Grain Company, 268 U. S. 189, is not referred to in the opinion. In that case the elevator bought the grain from the farmers, and became the absolute owner thereof just as much as the cotton buyer became the absolute owner of the cotton in the case at bar. The elevator then shipped the grain to a terminal market without the state, there to be sold. In other words, the elevator bought the grain, which was one transaction; and then shipped it out of the state to be sold, which was another transaction.

The cotton buyer first sold the cotton out

of the state, and then bought the cotton to ship out of the state on his contract. We see no difference in principle between the Shafer case and the case at bar. Absolute ownership in the buyer exists in both cases.

Now, quoting from the Shafer case, we have the following:

> "Buying for shipment, and shipping, to markets in other states, when conducted as before shown, constitutes interstate commerce, the buying being as much a part of it as the shipping. We so held in Lemke vs. Farmers Grain Company, supra, following and applying the principle of prior cases."

We respectfully submit that the Shafer case and its predecessors should be overruled if the opinion in the case at bar is allowed to stand. But we see no way to answer the Shafer case. No grain could be shipped for sale unless it could be bought. Admittedly, the shipping for sale is interstate commerce. But the buying of the grain is an indispensable concomitant of the shipping and selling. It is not a mere preliminary step. To tax buying of grain, when the buying is for the purpose of shipping for sale, is just as effective a restraint on interstate commerce as to tax the shipping for sale.

In the case at bar, to tax the buying of cotton, when the buying is for the purpose of and essential to filling an interstate order, is just as effective a restraint on interstate commerce as to tax the selling. The cotton buyer would not sell unless he could buy. It is an indispensable concomitant of the selling, and not a mere preliminary step. This buying and selling are inseparable; they are interstate commerce itself. They are just as necessary to propel the cotton across the state line as is transportation by the railroads. Without buying and selling and transportation the cotton would never move across the state line. We have no quarrel with the recent case of Federal Compress & Warehouse Company, vs. McLean, 290 U. S._____. It is different from the case at bar.

If a buyer sold to another buyer of the Chassaniol class, who in turn sold to a mill without the state, the first transaction would be intrastate commerce and subject to the tax. But that is not the situation, except for the "overs" and these are shown to be but a necessary incident to the main transactions. Without the buyer of Chassaniol's type the cotton would never leave the state. His purchase is in fulfillment of the last transaction of sale which is followed by the shipment of the very cotton bought. In the one personage of Chassanoil we find consolidated the person who has

sold in interstate commerce, and is buying to fill his contract. If the state should lay a prohibitory and valid tax, say of $10.00 per bale, either upon his buying or his selling, he will, in either event, be forced to abandon his business. Such a tax would burden interstate commerce either way it was laid.

In closing, we further respectfully point out that the opinion reveals a misapprehension of fact with reference to the "overs." It is said in the opinion: "And some of the cotton bought as 'overs' changes ownership several times within the state." The record reveals only one resale of overs and that is to a buyer who happens to have an interstate order for such cotton, and who buys the "overs" for the purpose of shipping on that order. We suggest that this misapprehension may have been caused from an inadvertent admission of counsel at the oral argument.

We are aware of our own limitations, but respectfully submit that we are unable to differentiate the principles of the Shafer case from this case.

It is, therefore, submitted that a rehearing herein should be granted, and that a proper

enlargement of time should be ordered for the issuing of the mandate.

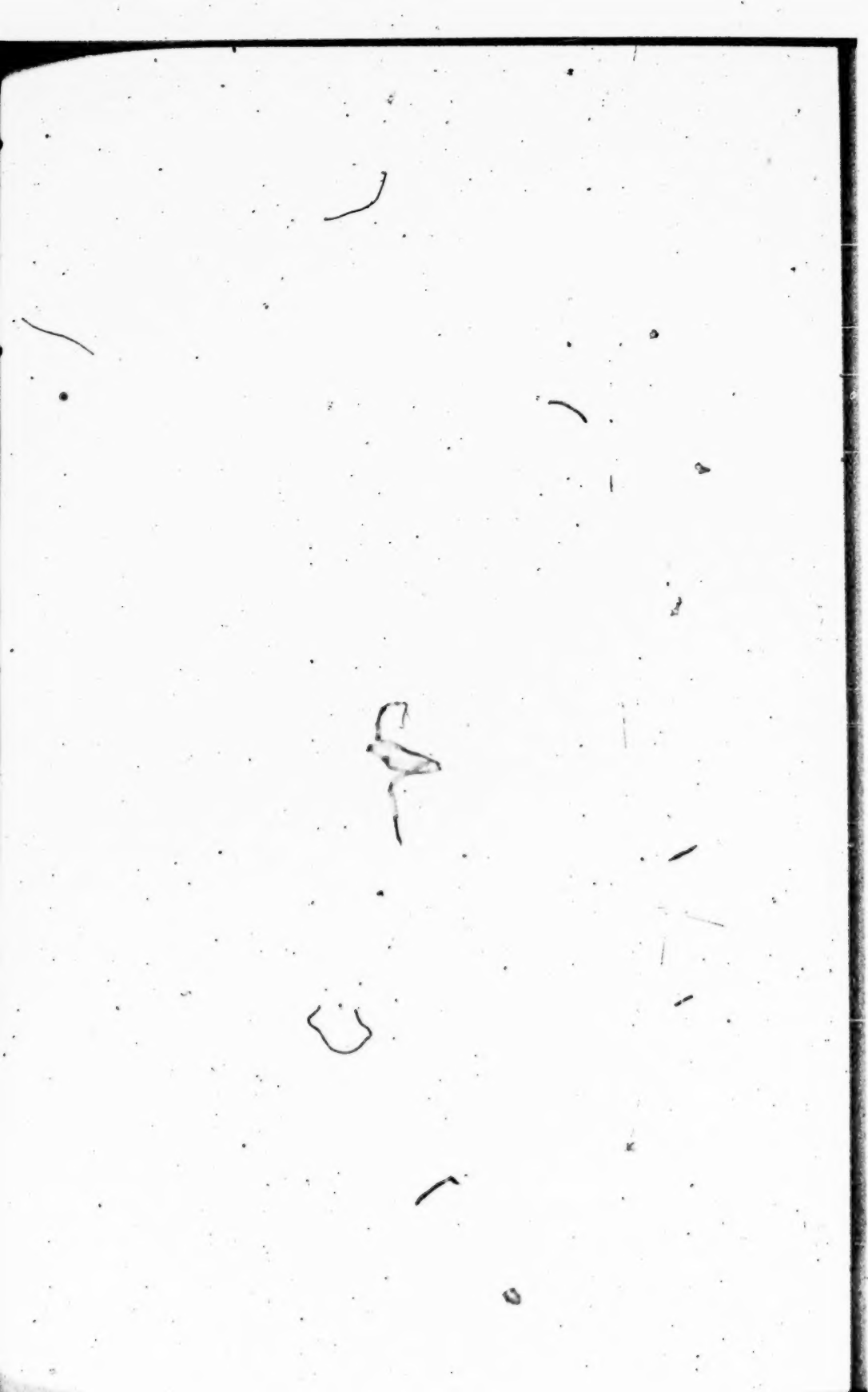
Respectfully submitted,

EDWARD W. SMITH,
SAM C. COOK,

Attorneys for Petitioner.

I, the undersigned Edward W. Smith, Attorney of record for petitioner (appellant) in the above styled cause, do hereby certify that the above and foregoing petition is presented in good faith and not for delay.

Attorney for Petitioner.



SUPREME COURT OF THE UNITED STATES.

No. 428.—October Term, 1933.

H. Chassaniol, vs. City of Greenwood. } On Appeal from the Supreme Court of Mississippi.

[March 12, 1934.]

Mr. Justice Brandeis delivered the opinion of the Court.

The City of Greenwood, Mississippi, laid by ordinance, in 1931 and in 1932, a tax "upon every person engaged in the business of buying or selling cotton for himself" within the city. In each year a tax of $50 was assessed to Chassaniol. He paid it under protest; and duly applied for refund to the City Council, claiming that the tax was illegal, and that the ordinances and the statutes authorizing it as construed and applied were void, because they violate the commerce clause of the Federal Constitution. The City Council refused the refund. Its action in denying this claim under the Constitution was sustained by both the Circuit Court of Leflore County and by the Supreme Court of the State, 148 So. 786. Whether they erred in so holding is the only question presented for decision by this appeal.

Greenwood is a concentration point for long staple cotton and an active market for its purchase and sale. All of the cotton there dealt in is grown and ginned in Mississippi. It reaches the Greenwood warehouses, about 70 per cent by rail, the rest by automobile, truck, or wagon. There, it is compressed substantially as described in *Federal Compress & Warehouse Co.* v. *McLean*, 290 U. S. —. Purchases and sales are made upon the market by transfer and delivery of receipts issued by the local warehouses under the United States Warehouse Act. The prices are governed largely by transactions on the cotton exchanges of New York, Chicago, New Orleans and Liverpool.

There are at Greenwood about 25 cotton buyers, each of whom, like Chassaniol, purchases and sells cotton for himself. The buyer becomes the absolute owner. He makes the profit or bears the loss. But when he buys he customarily has in hand and in mind orders

or contracts for that particular grade, for immediate or future delivery in other states or countries to the extent of about 90 per cent, on the average, of all cotton purchased by him. The remaining 10 per cent, he buys because, as often happens, growers of cotton refuse to sell less than their whole lot; and the lot may include a quantity greater than, or some bales of a grade different from, that for which the buyer has orders or contracts. The surpluses so bought are called "overs." Sometimes the "over" is held by the buyer until he gets an order or contract on which it can be placed. Sometimes the "over" is sold to another buyer at Greenwood. And some of the cotton bought as an "over" changes ownership several times within the State. But eventually the "overs", like the rest of the cotton, are shipped in interstate or foreign commerce.

Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in *Federal Compress Co.* v. *McLean;* and the rule there declared must govern here. Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce. Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, or processed, by them may be subjected to a property tax.

There is nothing in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 or in *Lemke* v. *Farmer's Grain Co.*, 258 U. S. 50, inconsistent with this conclusion. The regulations involved in those cases were found to impose a direct burden upon interstate commerce itself. *Stafford* v. *Wallace*, 258 U. S. 495, is also in harmony with the rule here applied. See *Minnesota* v. *Blasius*, 290 U. S. 1, 7-8.

Affirmed.